89-158

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM 1990

PATRICIA M. BOURKE,

Petitioner

V.

Jeanne Schuman
William Gibbs
David Himmelman,

Respondents

PETITION FOR WRIT OF CERTIORARI TO ISSUE TO UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI
Part I of Appendix

Patricia M. Bourke
Attorney at Law
P.O. Box 415
Walnut Creek, California
94596
PH. (415) 944-4718

Attorney in Pro Per
Counsel of Record

QUESTIONS PRESENTED

Under what circumstances, if any, may a final state court judgment resulting from private tort litigation be reviewed for constitutional violations in a U.S. District Court?

May a U.S. District Court entertain a collateral attack on a final state judgment if the face of the record demonstrates multiiple violation(s) of substantive and procedural due process, and each state court refused to recognize, address, or decide any of these issues even though they were timely and properly raised before them?

Can a state litigant have had a full and fair opportunity to litigate if the state courts each, in turn, refused to recognize, address, or decide genuine issues concerning egregious error which were repeatedly and timely brought to their attention?

If a judicial arbitration award was appealed and affirmed summarily under circumstances which clearly indicated the state courts had accorded the litigant neither a full or fair opportunity to litigate genuine federal issues, may a U.S. District Court assume jurisdiction?

If an arbitration decision is patently contradictory on its face, contains legal reasoning diametrically opposed to elementary law, disregards pivotal, undisputed evidence, contains multiple egregious legal errors, and is otherwise transparently erroneous, and then reached a result which demonstrably reversed liability between the parties, would such violate substantive due process?

Does an arbitration award, which gave punitive damages for communications falling squarely within the privileges established by state law, violate the civil rights of the purported judgment debtor?

Does the First Amendment protect one from liability for truthful statements made by and about private persons and regarding subjects which have no public import?

Does the First Amendment protect one from liability for defamation based on communications made in good faith to public officials and/or governmental agencies?

May an arbitrator hearing a binding judicial arbitration penalize a litigant with punitive damages for defamation if the record reveals she was without fault? May/must a U.S. District Court exercise its jurisdiction if no state court has considered the First Amendment issues raised?

May a final state court judgment be collaterally attacked in a U.S. District Court if it purports to impose substantial compensatory and punitive damages for statements protected by the First Amendment?

May/must a U.S. District Court exercise its jurisdiction if such issues were timely raised in the state courts and no state court recognized, addressed or decided the issue(s)?

Do the "notice" requirements of the Fourteenth Amendment require that a defamation action submitted to binding judicial arbitration be pleaded so as to set out, at least, the substance of each and every separate communication complained of? Does an Arbitration award for defamation violate minimum due process when it is exressly predicated, in part, upon separate communications with different content and published to different persons than those which were pleaded and litigated?

May an arbitrator hearing a binding judicial arbitration decide issues which were unpleaded and unlitigated, but which were discerned (invented) by him after submission by use of evidence submitted by the adversary for a wholly different purpose?

May a state court impose substantial sanctions for "frivolous appeal" when the underlying judgment on its face contained multiple, egregious errors, demonstrably

exceeded the scope of the issues, and penalized what the record showed to be truthful statements? May/must a U.S. District Court exercise its jurisdiction under such circumstances, if the issue of the impropriety of the sanctions was timely raised and no state court recognized or addressed the issues?

Does the imposition of sanctions or punitive damages violate the Eighth Amendment if the same is done on a wholly arbitrary basis?

Can enforcement attempts undertaken by private parties of a constitutionally defective final state judgment give rise to an action against the judgment creditor and her counsels under 42 USC 1983 et seq?

Does 42 USC 1983 provide a federal cause of action against state plaintiffs who intentionally and maliciously use a knowing and willing state forum to deprive persons of constitutionally protected rights?

May a U.S. District Court impose sanctions under F.R.C.P. 11 in an amount double the fees and costs accounted for by the adversary?

May a U.S. District Court impose sanctions under F.R.C.P. 11 when there is case authority from the same circuit which recognized the validity of the same sort of action on highly analogous facts?

May a Circuit Court rubber stamp a dismissal of a summary civil rights action and an assessment of substantial sanctions by an unpublished decision which openly misrepresents the record, misconstrues the legal authorities, and invents new rules for state arbitrations?

May federal courts ignore a Motion to Augment the record to set out further violations of constitutional rights suffered from the joint action of state judges and the defendants while a civil rights action pends?

PARTIES

The parties defendant are shown in the caption as is the party plaintiff/petitioner. All are licensed California attorneys. The within Petitioner appears In Pro Per, as does William Gibbs whose address is 169 14th Street, Oakland, Ca. Phone (415) 893-2270.

OPINIONS BELOW

The only decisions rendered in the within case, are fully set out in the Appendix p. 1-5

GROUNDS UNDER WHICH JURISDICTION IS INVOKED

Petitioner seeks a Writ of Certiorari directed at the U.S. Circuit Court of Appeal for the Ninth Circuit under 28 U.S.C. 1254. Said court denied rehearing by a decision filed April 20, 1990, see Appendix p. 13-14. Their underlying decision was filed Feb. 6, 1990 and is at pages 1-12 of the Appendix.

PROVISIONS, STATUTES, AND RULES RELIED UPON

Are set out in the appendix as well as are the various sections referred to. (A.p. 234-246

TABLE OF CONTENTS

TABLE OF CONTENTS - APPENDIX

OPINIONS, DECISIONS **Page**

SUMMARY ORDERS AND DENIALS:

MISCELLANEOUS DOCUMENTS/PLEADINGS/ORDERS:
(Chronological Order)

TABLE OF CASE AUTHORITIES CITED .

CALIFORNIA CODES, STATUTES:

FEDERAL CODES, RULES

STATEMENT OF THE CASE

The underlying dispute involved Petitioner's complaint against her former law office associate (hereinafter called "Schuman") for interference with advantageous relations and conversion. Schuman then cross-complained against Petitioner for defamation, intentional infliction of emotional distress, and other small disputes not pertinent herein. Both Petitioner and Schuman are licensed California attorneys. The aforesaid Complaint and Cross-Complaint were referred by stipulation to binding judicial arbitration by Oakland-Piedmont Municipal Court. (A. 19, 28, 29, 52)

The federal issues herein involved have their source in the Arbitrator's sizeable money award to Schuman for "defamation" and "intentional infliction of emotional distress" arising from certain letters written by Petitioner. The lengthy, written decision produced by the Arbitrator attempting to justify his large award against

Petitioner on these causes of action, reveals on its face that the Arbitrator grossly exceeded the scope of the pleadings, violated Petitioner's First Amendment rights, was patently contradictory on its face, and so grossly and arbitrarily misconstrued whole bodies of elementary California law that he actually reversed liability between the parties.

The basic circumstances surrounding the underlying litigation involve no substantial *1 factual dispute. Schuman made a referral to Petitioner of two Social Security claimants when she was employed full time by Petitioner. Petitioner, in turn, assigned Schuman to service their cases. Schuman procured each to sign a written retainer agreement which named Petitioner as their

---

*1 Since a there is no formal record made at a judicial arbitration, what occurred at the hearing was set out by Petitioner in a sworn declaration pursuant to Hirsch v. Ensign (1981) 122 CA 3d 521, 176 Cal Rptr 17, Schuman filed no declaration or otherwise refuted Petitioner's declaration, so Petitioners statements form the record of the Arbitration proceeding. (A. p. 114-132)

sole attorney, insured her of the right to retain a duplicate file, and authorized her to retain an associate counsel to assist. (A.p.20-22,114-116, 125, 163)

During the course of the servicing of the claims, Petitioner paid all overhead, advanced costs, and paid Schuman's wages for servicing them pursuant to written pay vouchers periodically submitted by Schuman. By the Spring of 1981 Schuman completed all the legal services for both clients under the foregoing terms and circumstances, and submitted a form to Social Security asking for the fees whereon she designated herself as having acted as Petitioner's associate. (A. p. 22-23, 26, 116, 117, 165)

Later, but before Social Security had transmitted any of the fees, a dispute arose between Schuman and Petitioner. Subsequent to completing the cases in issue, Schuman had undertaken to sub-let office space from Petitioner, but did not pay rent nor certain minor amounts Petitioner claimed due.

Nevertheless, Schuman demanded payment in full of her last pay voucher, with no off-set for the sums Petitioner claimed. When Petitioner would not agree, Schuman threatened Petitioner that she would take the Social Security fees! In furtherance of this threatened embezzlement, Schuman thereupon stole both clients case files from Petitioner's secretary's desk, and continued to refuse to return them even when Petitioner called the police. Schuman was thereupon terminated by Petitioner. (A. p. 23-25, 118, 120, 165, 166)

Thereafter Schuman contacted both clients regarding this dispute without Petitioner's knowledge or consent, an act directly contrary to the provisions of California Rules of Professional Conduct 2-100. Schuman thereupon induced each of these unsophisticated clients to sign a statement indicating that she, and not Petitioner had been their attorney, and accordingly she was the one entitled to the (full) fees and case files!! Since there was

at no time any Substitution of Attorneys involved (Cal. Code. Civ. Proc. 284-285), Schuman was, in effect, thereby inducing breach of contract, and commiting fraud on the clients. When she then sent these statements to Social Security to induce them to divert both the fees to herself, she was defrauding both Social Security and her former employer. (A. p. 118, 119, 126, 127, 166, 168)

In order to try to protect herself from Schuman's misappropriation of fees owed her, Petitioner wrote letters to each client. Firstly she informed them that Schuman was no longer involved and tried to explain Schuman's true status as a mere employee. Petitioner also tried to enlist their help to prevent the theft of the fees, and to gain temporary access to the case files to make copies (per the contract). Petitioner also sought to explain simple agency principles to the clients. She also requested aurhorization from them so as to induce Social Security to send her copies of

pertinent papers. These papers were to have been used in the litigation Petitioner planned to file against Schuman. However, having been apparently totally alienated by Schuman, neither client responded and both refused to cooperate in any way. (A. p. 27, 73, 84-113, 127, 128, 168,

In response to Petitioner's letters written to Social Security, initially it claimed everything was "confidential" and that Petitioner needed the authorization of either Schuman or the clients to assist her!!?? Petitioner thereupon wrote to her congressman for assistance and also reported Schuman's unethical conduct to the State Bar. (A. p. 25, 130)

Weeks later, Schuman transmitted a personal check purporting to be Petitioner's share of the first Social Security fee check. However she had deducted and retained for herself the full amount of her last pay voucher, making no allowance for any rent or other sums Petitioner had claimed. When

Petitioner initially attempted to negotiate Schuman's personal check, it was dishonored by reason of insufficient funds. Hence, Schuman had not only co-mingled these funds contrary to the provisions of Cal. Rules of Professional Conduct 4-100, but she had also been using even the part of the money she deigned to allocate to her former employer!! (A. p. 26, 119-120, 167)

In the meantime, Schuman wrote to Petitioner warning her not to be contacting "her clients", and informing her that she intended to treat the next fee check in the same way! (A. p. 120, 129, 167)

Months later, Schuman transmitted another check supposedly representing the fee from the second case, but placed a restricted endorsement on the reverse (the nature of the restriction being in dispute). Petitioner returned the check to Schuman and on or about May 27, 1982 instituted the Municipal Court action against her as aforesaid. The clients were also named in the suit due to their

breach of contract, and as means of facilitating return of the files which were still in Schuman's possession, and regarding which they were each now asserting "attorney/client privilege".(A.p. 32, 119, 120, 167)

Significantly, Schuman also expressly claimed a right to a normal "referral fee" in her Cross-Complaint. Her claims of "defamation" and "emotional distress" were specifically predicted upon 8 letters Petitioner had written to the clients and to Schuman's new employer regarding the dispute. Schuman specifically described these 8 letters in her complaint and then actually appended them to it. (A.p. 29, 62-113, 164, 165).

During the course of the Arbitration hearing had in June, 1985, Petitioner submitted some seven letters into evidence which she had written to Social Security, the * State Bar, and to her Congressmen for the sole purpose of demonstrating her incidental

damages incurred by reason of Schuman's conversion (Cal. Civ. Code 3336). Schuman at no time made any motion to amend nor to have these letters (each written some three years before) to be considered under her Cross-Complaint. (Having conducted no discovery during the pendancy of the litigation, she apparently did not know of this correspondence.) Consequently, the hearing in no way addressed the content of these seven letters and resultantly Petitioner had no warning, no opportunity to object, and perceived no occasion to have to mount any defense whatsoever. (A. p. 27, 122-124, 161-163)

The Arbitrator took the matter under submission and rendered a decision wherein he repeatedly used intemperate and inflammatory language to castigate Petitioner severely, claiming that she was engaged in a "personal vendetta" and that each of her accusations against Schuman were but "perceived grievances". (A. p. 26, 30, 31, 37)

He then went onto expressly conclude that Petitioner....

> had no contractual relationship with either client...(A. p. 31)
>
> had no interest in their cases...(A. p. 33)
>
> had no right, as against Schuman, to claim the attorney/client relationship... (A.p. 31-33)
>
> had no right, as against Schuman, to exercise dominion or control over the fees (A. p.32, 33)
>
> no right to claim the files...(A. p. 33)

The Arbitrator also specifically and expressly explained how and why he reached these conclusions about the legal effect of the facts he had found. Schuman had all these rights. Significantly, it was not because of some peculiar terms of her arrangements with Petitioner. Rather rather he explained it was because it was Schuman and not Petitioner who met the client and performed all the legal services for them!!! Besides, the Petitioner could hardly claim a "relationship" with the clients when they did not know who she was

and who said they wanted Schuman as their attorney![*2] (A.p. 31, 33)

In referring to the underlying written contract, he relegated it to a footnote and actually insinuated it named Schuman as "attorney"!! (A.p. 21 fn. 1)

The Arbitrator dismissed Petitioner's claims of privilege by inventing brand new exceptions, and applying them retroactively.[*3] For example, he claimed no privilege applied because Petitioner's statements were concluded to have been "unjustified". (A. p.37) Similarly Petitioner's statements were

---

* 2 Rather than recognizing that this evidence demonstrated that Schuman had likely been misrepresenting her status to the clients all along and thereby overtly breaching the fiduciary duty owed her employer, this evidence was seen as further proof that Petitioner should have no rights!!

---

*3 Every letter involved here was squarely within California privileges, the unpleaded letters were absolutely privileged for <u>two separate reasons</u> having been written to public agencies regarding litigation! (C.C. 47(2)(3) Moreover, every unpleaded letter was subject to California's one-year statute of limitations. (Cal. Civ. Code 340) But, no opportunity was given to so inform the Arbitrator of either of these defenses.(A.p. 19, 120)

found to have been "malicious" because they were "decidedly unflattering" to Schuman. (A. p. 27, 37)

In justifying his decision, he made express reference to "fifteen letters", including, without any distinction being recognized, the 8 pleaded along with the 7 submitted into evidence by Petitioner per above!! (A. p. 28)

In addition, the Arbitrator made numerous other references to the unpleaded, unlitigated letters in attempting to justify his award. He referred to the unpleaded letters he was relying on to justify the award by their addressees: i.e. "Social Security", "Congressman", and "State Bar". He even referred to one unpleaded letter by its date. Most significantly, when he quoted the language he found most "defamatory", the record reveals that great majority of the remarks are found nowhere in the pleaded letters! (A. p. 27, 28, 38, 73-113)

The Arbitrator then proceeded not only to

award Schuman $10,000 in punitive damages and $4,500.00 in compensatory damages by reason of Petitioner's communications, but he also awarded her a generous "referral fee" for having referred these two cases to Petitioner (i.e. the same 2 cases in which he had already decided Petitioner had "no interest" and "no rights")!!? (A. p. 38, 39)

If Petitioner's letters are viewed in light of the proper and normal legal effect mandated by established agency principles, the overwhelming majority of her statements regarding Schuman are patently truthful. To the extent that applying the proper legal effect to the undisputed facts does not necessarily demonstrate the truthfulness of the remaining statements, the record demonstrates that these too were substantially truthful in that they are corroborated by Petitioner's unrefuted Declaration, by disinterested witnesses, and by Schuman's own admissions. (A. p. 125-132)

The within record shows that Petitioner

made repeated attempts to have this large
patently insane judgment set aside by timel
motions and writs taken before every court i
the state system. The Municipal Court Judg
ignored the procedural due process argumen
as well as the other egregious errors an
perfunctorily denied the Motion to Vacat
under circumstances which suggest that he ha
not even perused her extensive brief. (A. p
53-60, 133, 134, 169-171)

Upon filing a timely appeal to th
Appellate Division of the Superior Court
she was confronted with overwhelming bia
against reversing the lower court. Onc
again, the circumstances suggested that th
panel had not even read her pleadings. Thi
inference is virtually proved conclusively i
that this Alameda County Appellate Pane
incredibly CITED PETITIONER TO SHOW CAUSE WH
SHE SHOULD NOT BE ASSESSED SANCTIONS FO
"FRIVOLOUS APPEAL"...apparently a techniqu
intermittently used by these judges t
discourage appeals! (A. p. 55, 169, 171, 172

What occurred at the hearing on "frivolous appeal" further reinforces an inference of judicial misconduct. After Petitioner fully apprised the panel of all the egregious errors in the award, they took the issue under submission. They then judiciously waited until both the District Court of Appeal and the California Supreme Court had denied discretionary writs, and then proceeded to levy sanctions of $2,500 for "frivolous appeal" by a decision which patently misrepresented the record, and under circumstances highly suggestive not only of bad faith but of actual malice! (A.p. 41-48, 172-176)

In the meantime, the Respondents have undertaken numerous collection proceedings against Petitioner, including the placing of liens against her name, thereby affecting her credit, have summoned her to two Orders of Examination, have procured an ex parte order to have her to be served by mail with a contempt citation for failing to pay these

large sanctions (contrary to California law, see infra), and then procured a bench warrant to issue which recited "Bail $50,000 cash only" (a provision which was patently contrary to California law); finally Respondents acted in concert with one of the local judges to have Petitioner sentenced to 5 days in jail for contempt because she invoked the Fifth Amendment under circumstances where its proper applicability was obvious. (A. p. 141, 149, 198-215, 135, 136, 157-158, 196)

In then attempting to obtain relief from this jail sentence, Petitioner brought a Writ in the Superior Court relative to the contempt citation, and coupled with it a motion to be relieved of the judgment as void on its face (outside the issues). After tentatively deciding to deny her entirely, the Presiding Judge issue an order dissolving the contempt, but refused to vacate the judgment under circumstances which hardly constituted either a full or fair hearing.

(A. p. 216-221)

Upon bringing a complaint in U.S. District Court, Petitioner's complaint was summarily dismissed with Judge Vukasin (a former judge of Alameda County) quoting the inflamatory language of the Arbitrator at length and with open approval! He also then commented that as far as he was concerned the Arbitrator had made no error of fact or law! (A. p. 191, 192, 195) He also found that he had not exceeded the scope of the pleadings because Schuman had pleaded "defamation" and had recovered for defamation. (A. p. 195) Accordingly, he concluded Petitioner's federal complaint was "frivolous" and she was, once again fined sanctions of $5,000.00 under F.R.C.P. 11, this amount being the equivalent of twice the sum Respondents claimed to have been incurred as attorney fees!!" (A. p. 189, 197)

Petitioner thereupon sought a summary reversal and a stay from the Ninth Circuit, only to be again summarily denied, and

once again threatened with further sanctions by the Ninth Circuit! (A. p. 222)

INTRODUCTION - TWO WHOLLY DIFFERENT BASIC ISSUES

The within Petitioner alleges that the Arbitration Award was predicated upon a lack of subject matter jurisdiction by reason of its having been based, in part, on seven letters, each of which constituted separate and distinct causes of action about which she had neither any notice nor any hearing. Such collateral attacks in federal district courts predicated upon a challenge to a state judgement for lack of subject matter or personal jurisdiction have long been recognized. However, there exists no comparable recognition for constitutional challenges to final state court judgments which are assailed for other sorts of constitutional defects in the U.S. District Courts. This dichotomy was recognized and discussed in Manufacturers Record Publishing Co. v. Lauer (1959) 268 F. 2d 187, 191-2; Nongard v. Burlington County Bridge Comm.

(D.C.N.J. 1955)* 133 F.S. 238. Since the applicable law as enunciated by the federal courts is entirely different, these two issues will be treated separately.

IF A STATE COURT HAD BOTH PERSONAL AND SUBJECT MATTER JURISDICTION, AND ENTERED A FINAL, CIVIL MONEY JUDGEMENT, MAY THAT JUDGMENT EVER BE THE SUBJECT OF A COLLATERAL ATTACK IN A U.S. DISTRICT COURT?

The United State Supreme Court in Rooker v. Fidelity Trust Company (1923) 263 U.S. 414, 44 S. Ct. 149, 68 L.Ed. 362, held that where state court with both subject matter and personal jurisdiction, rendered a judgement after a full hearing, the decision was responsive to the issues, and that judgment, in turn, had been "affirmed" by a state's Supreme Court, then a U.S. District Court had no jurisdiction to entertain a proceeding to reverse or modify the judgment for constitutional error. The U.S. Supreme Court held that only it had jurisdiction to affect such a judgment. As will be demonstrated, many federal courts have viewed this case as the seminal decision

the lower federal courts of any jurisdiction to review a final state court judgment even if the substantive error violates constitional rights.

Juxtaposed against that ruling and its progeny in the federal courts is Mitchum v. Foster (1972) 407 U.S. 225, 92 S. Ct. 2151, 32 L. Ed. 2d 705, which addressed a civil rights action brought under 42 USC 1983 against judges and law enforcement officials for having undertaken to close down an adult bookstore. The U.S. Supreme Court reversed the District Court's dismissal and found that civil rights actions were expressly exempt *4 from the provisions of 28 U.S.C.A. 2283.

---

*4 Cases involving this anti-injunction law cause a major lack of logical consistency. Where state court litigation between private parties is still "pending", some cases hold that a U.S. District Court has an "unflagging obligation" to exercise its jurisdiction in 42 USC 1983 cases if the constitutional challenge is valid, and provided there is no vital state interest at stake. Miofsky v. Superior Court (1983) 703 F. 2d 332, 338; Traughber v. Beauchane (1985) 760 F. 2d 673. Yet, as will be shown, some federal courts so rigidly apply Feldman and Rooker that any actions relative to obtaining relief from final state court judgment are automatically

The United States Supreme Court in Mitchum (supra) observed that the purpose of 42 USC 1983 was to effectuate the Fourteenth Amendment and to establish the federal government as guarantor of basic federal rights against state power "...whether that action be executive, legislative, or judicial". (p. 2161). The purpose was to "...throw open the doors of the United States courts to those whose rights under the Constitution are denied or impaired"...to interpose the federal courts between the states and the people". (p. 2161-62). The likelihood of meeting any of these goals greatly hampered and rendered infeasible if there is to be any outright prohibition of review by U.S. District Courts of final state judgments as espoused by the within panel.

---

* 4 (contd) dismissed out of hand and without regard to whether they involve palpable constitutional violations. From the standpoint of state judges, it would seem interfering in on-going litigation is the far greater affront. From the standpoint of the litigant, it would seem far more important to insure that recourse is available if a final state court judgement violates constitutional rights.

Another line of U.S. Supreme Court cases, while not per se involving a challenge to a final state court judgement, does address the affect of prior state court judgments upon related civil rights actions brought in U.S. District Court. For example, in Haring v. Prosise (1983) 462 U.S. 304, 103 S. Ct. 2368, 76 L. Ed. 3d 595 in deciding whether to prevent a criminal defendant convicted in a state court from pursuing a civil rights action for damages against police for an illegal search, the high court decreed the civil rights action could proceed inasmuch as the federal plaintiff had pleaded guilty, and hence the issue of the illegal search was NEVER LITIGATED in the state court. In coming to this holding, the high court observed:

"As a general matter, when when issues have been raised, argued, and decided in a prior proceeding, and are therefore preclusive under state law, redetermination of the issues may nevertheless be warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation." (p. 2375) (citing Montana v. United Stated (1979) 440 U.S. 147, 164 n. 11, 99 S. Ct. 970, 979, n. 11, 59 L. Ed. 2d 210.

Another approach to the same issue was addressed in Migra v. Warren City School District Board of Education (1984) 465 U.S. 75, 104 S. Ct. 892, 896, 79 L. Ed. 2d 56, which held that where a state court had RECOGNIZED the federal claims AND had provided a FAIR PROCEDURE for determining them, then a federal court must accord a state court judgment the same preclusive effect as required by the laws of the state of origin. (p.897)

Basically, the same concept was also enunciated in Allen v. McCurry (1980) 449 U.S. 90, 101 S. Ct. 411, 66 L. ED. 308, which also required that a state court, otherwise acting within its proper jurisdiction, to have "shown itself willing and able to protect federal rights". (p. 418)

Indeed, contrary to these holdings, the within Ninth Circuit panel flatly refused to make any review of the record so as to evaluate whether petitioner actually had any full or fair opportunity to litigate any claim, or

whether the state courts had even recognized or considered the federal issues. Instead, it chose to interpret Dist. Court of Columbia Court of Appeals v. Feldman 460 U.S. 462, 103 S. Ct. 1303, 75 L. Ed. 2d 206 to stand for a flat, unequivocal, unyielding lack of jurisdiction to undertake any review of the state court proceeding no matter the circumstances, and no matter what the state court judgment was based upon or how it was determined.

Indeed, if the only avenue of recourse a litigant has against an unconstitutional final state judgment is certiorari to the United States Supreme Court, then, as a practical matter, we have effectively absolved the whole court system of every state from having to respect the guarantees of the Fourteenth Amendment.

Hopefully that is not what was intended by the Feldman decision. Indeed, it seems the decision should be read in light of its somewhat one-dimensional facts. After

reviewing the record, the high court simply found that the order from "a jurisdictions highest court" (necessarily) "encompassed the constitutional issues raised"...i.e. a supreme court had actually decided the point. Moreover, the District of Columbia then issued an explanation which was eminently reasonable, and no hint of any abuse of authority or arbitrariness presented itself.

Subsequent to Feldman (supra) is a series of cases wherein the lower federal courts directly grappled with an arbitrary exercise of power by a State Supreme Court: Robinson v. Ariyoshi[*5] (1985) 753 F. 2d 1468; (1977) 441 F. Supp. 559; Sotomura v. County

---

*5 The Robinson case (supra) was then brought into the United States Supreme Court, 477 U.S. 902, 106 U.S. 3269, and was overruled only in part by reference to Williamson County Regional Planning Comm. v. Hamilton Bank of Johnson City (1986) 473 U.S. 172, 105 S. Ct. 3108. The Supreme Court's companion case simply held that an award of damages was premature in that the civil rights defendants had, not yet, undertaken to enforce the judgment. Hence, it was left uncertain whether and on what grounds, if any, the U. S. District Court had properly assumed jurisdiction.

of Hawaii (1978) 460 F. Supp. 473 (hereinafter called the "Robinson cases")

In the Robinson cases, the Supreme Court of Hawaii, retroactively, and sua sponte decreed that certain water/real property rights would belong to the state even though these same rights had been long ago vested by both Hawaii law, and prior litigation, in the civil rights plaintiffs. Although the Hawaii Supreme Court judgment was "final" and it was supposedly based on "public policy", the federal district court nevertheless assumed jurisdiction under 42 USC 1983. In justifying this intervention, the U.S. District Court *6 referred to BOTH substantive and procedural irregularities in the Hawaii Supreme Court's decision.

---

*6 The claimed procedural irregularities arose because the decision (sua sponte) of the Hawaii Supreme Court went beyond the legal assumptions advanced by either party at trial and gave relief not specifically requested. It was further pointed out that the federal plaintiffs had been subject to an "almost farcical rehearing" when they sought to raise the federal issues after the decision. No lack of personal or subject matter jurisdiction appeared to be involved.

In particular, it was characterized as being a "shocking, violent deviation from solidly established case law". The decision was further said to involve a change of law which was "totally unexpected and impossible to have been anticipated" (Robinson, Dist. Ct. p. 566, 580, 583).

As a result of the apparent conflict between and ambiguity in the rulings of the U.S. Supreme Court, there exists pervasive uncertainty among federal courts as to when or whether they may review state court judgments on constitutional grounds.

Certain decisions reflect an open refusal to follow the Robinson cases (supra) [*7] or have tried to greatly limit their application. Are the Robinson cases mere odd aberrations, or do they embody an exception to Rooker and Feldman?

---

*7 For example Franco v. County of Marin 579 F. Supp. 1032, 1035; Reynolds v. Georgia (1981) 640 F. 2d 702, 707; Wood v. Orange County (11th Cir., 1983) 715 F. 2d 1543, 1546. However, each of these cases appeared to involve facts which did not even approximate the arbitrariness and/or unconscionability of the within judgment.

In both the Robinson cases (supra) and Worldwide Church of God v. McNair (9th Cir., 1986) 805 F. 2d 888, the applicable standard by which to decide whether a U.S. District Court has subject matter jurisdiction to review a final state court judgement was seen as wholly depending upon whether there had been an ACTUAL CONSIDERATION by the state court of the constitutional issue and a DECISION ON THE ISSUE presented. (Robinson p. 892; McNair 1472). The "inextricably intertwined" standard found in Feldman (supra) and the "full and fair opportunity to litigate" standard of Allen (supra) were seen as being but "two sides of the same coin". (McNair p. 892, Robinson p. 1492).

If this is the applicable standard, then two issues are presented. First, did Petitioner have a "full and fair opportunity to litigate" her constitutional claims, and if so, were these claims decided by the state courts? Firstly, a fundamental requirement of minimum due process has been held to be

the "opportunity to be heard at a meaningful time and in a meaningful manner". Mathews v. Eldridge (1976) 424 U.S. 349, 96 S. Ct. 893.

In the instant case, just as in the Robinson cases, the Arbitrator decision sua sponte created most of what has become the federal issues. Petitioner thereafter raised the constitutional issues at every juncture. (A.p. 133-134, 169-174, 176, 183-184, 186-187) Nevertheless, the undisputed record indicates that Petitioner's attempt's to have the award vacated were (just as in Robinson) given short shrift by every court and her motions "denied" without any explanation. (A.p. 53, 54, 55, 56, 57, 58, 59, 60, 61) In the initial motion made in Municipal Court, the circumstances suggested the judge had not even read her pleadings. (A.p. 169-171)

What is perhaps the most probative evidence that Petitioner was given no opportunity for any sort of meaningful hearing was the shocking fact that the Appellate Division of the Superior Court,

after receiving her thorough brief raising all points (gross errors of agency law, disregard of privileges, exceeding the scope of the submission, contradicting the contract, etc.), ACTUALLY CITED HER TO SHOW CAUSE RE "FRIVOLOUS APPEAL"!!! (A.p. 55)

This act clearly demonstrates that these judges not only totally failed to recognize the federal issues, but they were apparently intent upon simply rubber stamping appeals regardless of their merits and likely without even reading them!! (A. 171-172)

To have then followed this citation with a decision attempting to justify the assessment of huge sanctions ($2,500) for "frivolous appeal" by an opinion which utterly misrepresented the record (A.p. 49-51) is perhaps this Petitioner's most probative evidence of the bias, bad faith, and even malice on the part of the state judges involved.

Apart from the summary denials of writs without opinion, the only other interaction

Petitioner had with a judge was when she joined the issue of her jail sentence (for taking the Fifth Amendment, A.p. 198-215) with a motion to vacate the judgment as void and brought a Petition before the Presiding Judge of Alameda County. He flatly disallowed oral argument on the issue of "void judgment", gave non-sensical reasons for refusing to set aside the judgement, (A. p. 219-21), and then informed those assembled that "29 judges...addressed the issue" (A. p. 220)(including in that number, the 9 justices of the U.S. Supreme Court which had simply denied certiorari!), and then flatly informed Petitioner he was "not about to reverse" a finding of his "peers"[*8] (A.p. 220). Significantly, his bias was such that he too threatened Petitioner with further sanctions (A. p. 218). Finally, he was more than willing to adopt as true an outright

---

*8 Especially when to do so would draw attention to the fact that his "peers" had actually imposed a large fine on Petitioner for appealing a judgment "void on its face"!

misrepresentation of the record by Respondent (Gibbs) and then abruptly called another case. (A. p. 221).

When Petitioner then appealed the denial by the Superior Court of her motion to vacate the judgment (by reason of being "void on its face") to the District Court of Appeal, she once again confronted unbelievable bias, and a resolve to just get rid of the case. (A. p. 29-51). Not only did it summarily proclaim that all her claims were "patently meritless" (A. p. 51), but it sought to pretend that the matter before it concerned the sanctions (A. p. 50-51), and since the sanctions were not paid yet, somehow this rendered the judgment (issued some four years before) as not "final", and hence not reviewable on appeal!!? Probably no law was cited to substantiate this odd conclusion, because the law is clearly to the contrary. A California judgement becomes "final" when the time for appellate review has elapsed. Jennings v. Ward (1931) 114 CA 536, 300 P. 129. This

decision of the District Court of Appeal is, in light of the holding in Hunter v. Superior Court (1939) 39 CA 2d 100, nothing more than a flippant, irresponsible disregard of legal duty. Not only did this court refuse to hear Petitioner, but it perverted both the facts and law to avoid doing so.

Not only was there no semblance of a full or fair opportunity ever granted to litigate any issue, but clearly not one federal issue was ever recognized, let alone considered or decided. Moreover, the within judgment was neither "affirmed" nor "decided" by the Supreme Court of California. Rather, it was an arbitration award simply rubber stamped by each court in turn.

Clearly, what occurred here was no considered "change of law" for any "public purpose" or to respond to changing conditions, rather we have a travesty predicated upon demonstrably egregious ignorance of elementary law, or just possibly

on bad faith. *9

If, both the lack of a full and fair opportunity to litigate, the failure of the state courts to even recognize the substantive federal issues is not sufficient to overcome Rooker (supra) and Feldman (supra), then surely the standards of Migra (supra) would accomplish this purpose!? Where the issue is substantive error, there are California cases indicating that res judicata is not necessarily applied in special circumstances where errors in a judgment result in a manifest injustice. Greenfield v. Mather (1948) 32 C. 23, 35, 194 P. 2d 1; Louis Stores v.Department of Alcoholic Beverage Control (1962) 57 C. 2d 749, 757; City of Los Angeles v. City of San Fernando (1975) 14 C. 3d 199, 200.

---

*9 Just how could a licensed, California attorney make such errors in good faith, especially after having read the letters Petitioner wrote trying to explain agency law to lay clients? (A.p. 85-93, 98-100, 104, 111)(A.p. 36)

WHY AND HOW DID THE ERRORS IN THIS JUDGMENT AMOUNT TO A CONSTITUTIONAL DIMENSION?

STANDARDS SET BY U.S. SUPREME COURT:

If based upon the foregoing showing a U.S. District Court had jurisdiction to review the within judgment, then the next issue is what degree or kind of error will properly subject a state court judgment to collateral attack in a U.S. District Court?

In several old, rather obscure cases the U.S. Supreme Court itself reviewed state court judgment challenged on grounds of substantive error. Although each was, in the overwhelming majority of instances, affirmed, the high court enunciated certain standards to characterize the degree of error in a decision on which a state judgment is based which would violate substantive due process:

"gross and obvious, coming close to arbitrary action" (Roberts infra p. 691)

"plain rights have been ignored" (Roberts infra p. 692)

"whether the decision of the state court rests on a fair or substantial basis" (Demorest p. 388)

"a perverse reading of the law" (O'Neil infra p. 26)

"choice is clearly wrong, a display of arbitrary power, not an exercise of judgment" (Mathews infra p. 185)

O'Neil v. Northern Colorado Irrigation Co. (1916) 242 U.S. 20, 37 S. Ct. 7, 61 L. Ed. 123; Demorest v. City Bank Farmers' Trust (1944) 321 U.S. 384, 388, 64 S. Ct. 397, 88 L. Ed. 497; Mathews v. De Castro (1976) 429 U.S. 181, 185, 97 S. Ct. 431, 434, 50 L. Ed. 2d 389; Roberts v. City of New York (1935) 295 U.S. 264, 55 S. Ct. 689, 692, 79 L. Ed. 1429.

THE ARBITRATOR TURNED AGENCY LAW UPSIDE DOWN AND THEREBY TRANSFORMED TRUTH INTO LIES

Firstly, the Arbitrator found the basic facts to be substantially as alleged by Petitioner. (A. p.18-40) When those bare facts are supplemented by the unrefuted Declaration of Petitioner, (A. p. 114-132) only one legally plausible, simple conclusion results: Schuman made an outright referral of both clients to Petitioner (this is what any "referral fee" pays for!). She was then

assigned by Petitioner to service these clients and did so acting only as Petitioner's employee.

Inasmuch as Schuman's subsequent acts went far beyond what would ever be justified as self-help, Petitioner's accusations against Schuman in her letters were justified and her complaints were far more than the "perceived grievances" as characterized by the Arbitrator. (A. p. 26)

If one applies elementary agency principles the the large array of undisputed evidence, only one rational conclusion presents itself: what we had was a typical, universally understood agency relationship between Schuman and Petitioner, which relationship, in turn, brought into play a whole body of fundamental, indisputable, universally recognized agency principles which, in turn, clearly spell out the respective rights, duties, and obligations of both Petitioner and Schuman. Schuman had given uup her rights in and to these clients,

the fees generated, and their case files when she "referred" them to Petitioner.[*10] This becomes an inescapable fact when one notes she both sought and received what she characterized as a "normal referral fee". (A. p. 62, 29,

---

*10 Not only did Schuman fail to file any Declaration to contradict the sworn Declaration of Petitioner (see fn. 1), but throughout this litigation her only "defense" has consisted of the naked claim that these people were somehow "her clients". However, she admitted her sole method of informing Petitioner of this fact was that while working on their cases in Petitioner's offices she so referred to them! (A. p. 125-126) Her explanation as to why Petitioner's name appeared on the contract she procured the clients to sign was equally inane. (A. p. 132). In subsequently defending the within civil rights action, Respondent Gibbs, apparently recognized not only the travesty which occurred, but also the indefensibility of what Schuman had done. His Declaration (A. p. 178-189) is typical of his various pleadings filed in opposition, and his tactics are identical: engage in obvious evasions, half-truths, insinuated facts, insert ambiguous statements, belittle the significance of the case, and then feign a lack of understanding. However, his primary tactic has consistently been to argue that discretionary denials suffered by Petitioner "prove" the "merit" of Schuman's position. (E.g. A. p. 183, 184, 186) He has repeatedly counted in the nine justices of the U.S. Supreme Court who denied certiorari (A. p. 61) as amoung those many judges Petitioner has "failed to convince...of the merits of her cause". (A. p. 183)

Thereafter, Schuman's only connection to the clients or their cases was derived from and through Petitioner. Her sole right was to her wages. Once Petitioner terminated Schuman every contact made with or about these clients' affairs was both contrary to agency law and violative of Rules of Professional Conduct (e.g. 2-100, 4-100). See Pollack v. Lytle (1981) 120 CA 931, 175 Cal Rptr 81. None of these rights or duties would be affected because of a later financial dispute over an unrelated matter.

Moreover, in then utterly disregarding the plain import of the underlying contract right in evidence before him, (which ought to have been determinative of Petitioner's rights) the Arbitrator made findings directly *11 "contrary to undisputed fact".

It would indeed be difficult to imagine a set of facts involving more egregious

---

*11 This is one basis regarded by the Third Circuit in Wood v. Conneault Lake Park (3rd Cir., 1967) 386 F. 2d 121, as justifying the intervention of a U.S. District Court in a suit challenging a state court judgment on due process grounds.

error. We do not have "mere error" here, rather we have a decision which should more than meet the "gross and obvious" standard. These errors do not just "come close to arbitrary action", rather the reasoning goes beyond arbitrary into insane.

That these egregious errors were prejudicial is self-evident for it is demonstrable from the record that it is Schuman, and not Petitioner, who ought to be liable for substantial damages. Petitioner has suffered to have her patently truthful statements transposed into lies by an Arbitrator who, in effect, turned the law upside down over and over again, and then high-handedly chastized her verbally and assessed large compensatory and even puntive damages against her!

THE ARBITRATOR DISREGARDED THE ESTABLISHED LAW OF "PRIVILEGE"

Having apparently resolved to punish Petitioner, it mattered not that every letter clearly came, at least within the

"conditional privilege" discussed in Williams v. Taylor (1982) 129 CA 3d 745, 181 Cal Rptr 423. The Arbitrator likewise had no grasp of "absolute privilege" which applied to letters to public agencies or where a letter concerned proposed litigation. He simply circumvented the lot by proclaiming that Petitioner lost her "privilege" because her statements were not "justified"!! (A. p. 37) Indeed, if statements are "justified" one needs no "privilege". See Hagendorf v. Brown (9th Cir., 1983) 669 F. 2d 478, 480; Lebbos v. State Bar (1985) 165 CA 3d 656. (See discussion in First Amendment Section regarding privileges to contact public officials and agencies).

The U.S. Supreme Court has previously held in other contexts that a privilege once granted by the state, like a property right, it may not be taken away on an arbitrary basis. Graham v. Richardson (1971) 403 U.S. 366, 91 S. Ct. 1848, 29 L. Ed. 2d 408; Shapiro v. Thompson (1969) 394 U.S. 618, 89

S. Ct. 1322. Similarly, Miofsky v.Superior Court (supra) regarded a state's abrogation of the doctor/patient privilege as a sufficient ground for a 42 U.S.C. 1983 action.

THE ARBITRATION AWARD ABROGATED PETITIONER'S FIRST AMENDMENT RIGHTS

For the Arbitrator to have imposed substantial damages against Petitioner for "defamation" under circumstances indicating her statements were, in fact, truthful, was not only "arbitrary", but may well have violated her First Amendment rights. There is dicta in several cases, (e.g. Associate Press v. Walker (1967) 388 U.S. 130, 87 S. Ct. 1975, 18 L. Ed. 2d 1094; Curtis Publishing Co. v. Ruth (1967) 388 U.S. 130, 87 S. Ct. 1975; Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789, which imply that ALL truthful communications are protected by the First Amendment. However, no case actually holds that an individual who engages in private communications about non-public matters is

entitled to First Amendment protection for truthful statements. This case provides a unique opportunity to address this important issue inasmuch as "truth" is rarely openly punished, and whether a given statement is true is normally always a "fact issue" left solely to the trier of fact.[*12]

Secondly, by having assessed both compensatory and punitive damages because Petitioner wrote to the State Bar, her Congressman, and the Social Security Administration, the Arbitrator was not only acting "arbitrarily", and directly contrary to established California law (e.g. Lebbos v. State Bar (1985) 165 CA 3d 656) but he was, in addition, also abridging Petitioner's First Amendment Right to Petition the Government. Under the holding of McDonald v.

---

*12 In any human society it is just such forms of speech which comprise the overwhelming amount of all communications. Consequently, if important issues are in any way gauged by the numbers potentially affected, the need for a decision on this point stands in stark contrast to the need to clarify the law for the comparitively tiny number of malcontented grandstanders who would burn the flag.

Smith (1985) 472 U.S. 479, 105 S. Ct. 2787, 86 L. Ed. 2d 384, the high court inferred that a state had to recognize, at least, a conditional privilege for communications with public officials or agencies. This inference then became the holding of the Eighth Circuit in Bagley v. Iowa Beef Processors (8th Cir., 1986) 797 F. 2d 632.

Consequently, when this Arbitrator assessed both punitive and compensatory damages for Petitioner's letters to her Congressman, to Social Security, and to the State Bar, it would seem he was failing to recognize even a "conditional privilege". If one has made statements to public agencies in good faith there is to be no liability. Indeed, how was Petitioner supposed to have known that it was Schuman who had all the rights , when she was "referred" the clients, paid all the expenses, paid her associates salary for servicing them, and had her name on the written retainer agreement as sole attorney??!

Even if the Arbitrator's Award on its face violated Petitioner's constitutional rights, we once again confront the important issue extant: whether a patent violation of ones First Amendment rights by a final state court judgment can become the subject of collateral attack in U.S. District Court if there has been no full or fair opportunity to litigate those rights in state courts,*13 and no state court has recognized, addressed or decided any such issue. Authority on this point is more than scarce. In the case of Crosby v. Broadstreet (2nd Cir., 1963) 312 F. 2d 483, a federal court order long before entered under a stipulation was seen as a "prior restraint" and set aside under F.R.C.P. 60 by a circuit court who characterized it as "void". If a final state

---

*13 There was indeed no opportunity to litigate this privilege inasmuch as no letter written to these public officials or agencies was pleaded, and Petitioner had no knowledge or warning that they were in issue until after she received the award. Thereafter, she raised these privileges at every juncture only to again and again be turned away (see supra), with no court recognizing the issue let alone addressing it.

court judgment is predicated upon a patent violation of one's First Amendment right, is that judgment *14 not "void" and open to collateral attack in a U.S. District Court??

MAY A U.S. DISTRICT COURT ENTERTAIN A COLLATERAL ATTACK ON A FINAL JUDGMENT OF A STATE COURT FOR DEFAMATION IF IT IS PREDICATED, IN PART, UPON LETTERS WHICH WERE NEITHER PLEADED NOR LITIGATED?

It has long been recognized and understood that a U.S. District Court may entertain a collateral attack upon a final state court judgment if the same were rendered without "subject matter jurisdiction". Ritchie v. Sayers (Cir. W. Va. 1900) 100 F. 528, 531; Textile Bank Co., Inc. v. Rentschler (1981) 657 F. 2d 844; Comprehensive Merchandising Catalogues, Inc. v. Madison (7th Cir., 1975) 521 F. 2d 1210; Manufacturers Record Publishing Co. v. Lauer (supra); Nongard v. Burlington County Bridge Comm. (supra)

---

* Since only part of the within judgment was predicated upon the unpleaded letters, the whole is void on this ground because the award was expressed as a lump sum incapable of segregation. Perini v. Perini (1964) 225 CA 2d 399, 37 Cal Rptr 354; Capital Bond & Investment v. Hood (1933) 218 C. 729, 24 P. 2d 765.

It has long been clearly and indisputably established that a judgment is "void on its face" by reason of a LACK OF SUBJECT MATTER JURISDICTION, if it is predicated upon "issues" which were not pleaded, and upon which the parties had not been heard. See Reynolds v. Stockton (1891) 140 U.S. 252, 266, 268-69, 11 S. Ct., 773, 35 L. Ed. 464; Standard Oil Co. v. Missouri (1911) 224 U.S. 270, 281, 34 S. Ct. 406, 56 L. Ed. 760; J.P. Jorgenson Co. v. Rapp (9th Cir., 1907) 157 F. 732, 738-9.

Such rules have been consistently characterized as "fundamental" and are considered to be "essentials of due process" and "fair play". Sylvan Beach v. Koch (8th Cir, 1944) 140 F. 2d 852, 861-62; accord: Armstrong Cork v. Lyons (8th Cir., 1966) 366 F. 2d 206; Baar v. Smith (1927) 201 C. 87.

The requirements of specificity in pleading are more strict for "defamation" than for almost any other sort of civil action. So universally recognized is this requirement that the only issue extant in the

developing case law is the degree of exactitude between the words pleaded and the words proved. West's Digest, Libel and Slander, Key No. 85.

Both California and federal authorities are wholly in accord. Fleet v. Tichenor (1909) 156 CAf 343; Williams v. Gorton (9th Cir. 1976) 529 F. 2d 668. Some courts have characterized the need to plead "haec verba" as a NOTICE requirement. Asay v. Hallmark Cards, Inc. (8th Cir. 1979) 594 F. 2d 692, 698-9; Holliday v. Great Atlantic and Pacific Tea Co. (8th Cir., 1958) 256 F. 2d 297, 302.

In point of fact, each separate letter, even though growing out of the same dispute/transaction is BY DEFINITION A SEPARATE, DISTINCT CAUSE OF ACTION (i.e. not just a separate "issue")*15 Heuer v. Basin Park Hotel and Resort (W.D. Ark., 1953) 114 F. Supp. 604; Haddad v. McDowell (1931) 213 C.

---

*15 The decision of the Ninth Circuit referred to the seven, separate unpleaded letters as "evidence" of defamation, thereby blurring the material distinction between what the law sees as "evidence" on an "issue", and what is actually a separate "cause of action". 690, 3 P.2d 550. (A. p. 11-12)

690, 3 P.2d 550.

Indeed, such holdings fully comport with logic and common sense. Each separate letter typically brings into play its own set of facts and issues, damages, defenses, witnesses, pre-trial discovery needs, and different applicable privileges.*16

Nevertheless, this panel of the Ninth Circuit has concluded that because this judgment resulted from arbitration, none of these "fundamental rules" should apply, and Petitioner's complaints are nothing more than "technical argument".*17 (A. p. 11-12) It is further asserted by this panel in their "disposition ... not appropriate for publication" (A. p. 1), that "an arbitrator is

---

*16 That whole unlitigated letters may properly form the basis for a defamation award, becomes a ludicrous proposition, particularly in light of Bird v. Huber (1918) 179 C. 245.

---

*17 That severe prejudice resulted to Petitioner from these proceedings is self-evident. Every unpleaded letter was written to a public official or agency and was hence absolutely privileged, (C.C. 47(2)(3) but she had no opportunity to brief or even explain this to the Arbitrator. Moreover, the statute of limitations had run on each unpleaded letter over 3 years before.

not bound by the formal rules of procedure"! (A.p. 12) Since this was a California Judicial Arbitration, the rules governing the procedures are established by Rule 1613 of the California Rules of Court. This rule, in turn, specifically states that "the rules of evidence governing civil actions apply to the conduct of the Arbitration proceedings, except:" The specific exceptions which are then enumerated by no means even begin to authorize what occurred here.*18

The only substantiating authority cited by the within panel was Sunshine Mining Co. v. United Steelworkers of America (9th Cir., 1987) 823 F. 2d 1289, 1295. A fair reading of this case demonstrates that it in no way

---

*17 (contd) However, Petitioner had no opportunity whatever to raise either defense. See C.C.P. 340(3), Heuer v. Basin Park Hotel and Resort (W.D. Ark., 1953) 114 F. Supp. 604. Nor did she have any opportunity to decline to submit these causes of action to binding arbitration.

---

*18 The enumerated exceptions in Rule 1613 involved only minor changes in the applicable hearsay rules so as to permit certain normally reliable documentary material into evidence without laying a formal foundation.

substantiates holding of the court. Firstly, the Sunshine case does not even address any defamation issue. Secondly, it specifically holds: "...arbitrator's authority is limited to the ISSUE submitted to him by the parties"...an Arbitration hearing is "fundamentally fair" ONLY IF it involved ADEQUATE NOTICE, a HEARING ON THE EVIDENCE, and an impartial decision by the Arbitrator. (p. 1294)

In point of fact, no arbitration case remotely substantiates this panel views.*19 When an Arbitrator has decided an "unsubmitted issue" as shown by the face of his award, he is said to have "exceeded the scope of the submission" and his award is invariably vacated. C.C.P. Sec. 1286.2,

---

*19 In J. R. Norton v. Agricultural Labor Relations Board (1987) 192 CA 3d 874, 888, 238 Cal Rptr 87, it was held that an Arbitrator must not receive evidence on one issue, and then after submission use that same evidence to create new issues not encompassed in the submission. This procedure was specifically held to violate elementary constitutional principles of due process, and this is exactly what occurred here.(See A. p. 12, p. 229)

1141.23; Atlas Floor Covering v. Crescent House & Garden (1959) 166 CA 2d 211, 333 P.2d 194; William B. Logan v. Monogram Precision Industries, Inc. (1960) 186 CA 2d 200, 8 Cal Rptr 789. An arbitration award which goes beyond the issues is invalid altogether. White v. Arthur (1881) 59 C. 33. The United States Supreme Court has already held in an Arbitration context that a state may not grant preclusive effect in its own courts to a constitutionally infirm judgment. Kremer v. Chemical Construction Corp. (1982) 456 U.S. 61, 102 S. Ct. 1883, 1898, 72 L. Ed. 2d 262. It has also been held that when a federal court finds voidness in a judgment it is MANDATORY to grant relief. V.T.A. Inc. v. Airco, Inc. (10th Cir., 1979) 597 F. 2d 220, 224 fn 8.

California law is totally in accord. A judgment which is void on its face (e.g. it lacks subject matter jurisdiction) is entitled to no res judicata, and is open to collateral attack, can be vacated sua sponte, or by motion, even if it had been affirmed on

appeal. Pioneer Land Co. v. Maddox (1895) 109 C. 633; Hayashi v. Lorenz (1954) 42 C. 2d 848, 271 P. 2d 181. Res Judicata is inapplcable with respect to any part of a decision which goes beyond the matters in issue. Del Ricco v. Photochart (1954) 124 CA 2d 301, 268 P. 2d 814; Title Guarantee and Trust Co. v. Monson (1938) 11 C. 2d 621, 631.

MAY INDIVIDUALS BE SUED UNDER 42 USC 1983 BY REASON OF ACTS TAKEN TO ENFORCE A CONSTITUTIONALLY DEFECTIVE STATE COURT JUDGMENT?

The Ninth Circuit panel has misread the Petitioner's complaint. She does not sue Respondents by reason of having to pay the judgment. (A.p.9) Rather her primary ground establishing that these Respondents acted under "color of state law" stems from the many collection proceedings they have been instituting with the aid and participation of state officials. This fact was set out in her federal complaint, discussed in the briefs and addressed in oral argument. (A. p. 141, 149, 195-6)

It has been established by the U.S. Supreme Court that a private party can be sued under 42 USC 1983 if he is a wilful participant in joint action with the state or its agents. Dennis v. Sparks (1980) 449 U.S. 24, 101 S. Ct. 183. A civil rights defendant may be an attorney acting in conjunction with the courts if he has acted in bad faith. Tower v. Glover 467 (1984) U.S. 914, 104 S. Ct. 282, 81 L. Ed. 758. The "action" involved can be collection proceedings. Lugar v. Edmonson Oil (1982) 457 U.S. 922, 102 S. Ct. 2744, 73 L. Ed. 2d 482. In Scheiner v. City of New York (E.D.N.Y. 1985) 611 F. Supp. 172. the enforcement of a judgment entered without (personal) jurisdiction was found to be a valid basis for a 42 USC 1983 action. Whether defendants acted in good faith was a fact question to be determined at trial. U.S. General, Inc. v. Schroeder (E.D. Wisc. 1975) 400 F. Supp. 713. Collection activities of these Respondents has been on-going since

prior the filing of the complaint in U.S. District Court, and when a stay was denied, continued thereafter. Petitioner made a Motion to Augment the Record (A. 223-225) so as to call to the Ninth Circuit's attention the harassment and judicial misconduct she had been suffering after the stay was denied.(A. p. 222) Although the same was referred to the panel hearing the appeal (A.p.226), the motion was just ignored. (A.p.1-12).

These Respondents were not only seeking to enforce a constitutionally defective judgment by their various on-going collection methods, but they were willing participants with the judges in further violations of her rights. Under Mitchum v. Foster (supra) federal courts should not abstain if the state proceedings involve bad faith, harassment, or are patently violative of constitutional rights. Accord: Ciaffoni v. Supreme Court of Pennsylvania (D. C. Pa. 1982) 550 F. Supp. 1246, (affirmed without opinion, 723 F. 2d

896)

Not only was the underlying judgment defective in the manners described herein, but the collection proceedings themselves constituted repeated violations of both state and federal law. [*20] For he most part, each of these events occurred after Petitioner had petitioned the federal courts for relief, hence a retaliatory purpose may have motivated the state judges involved.

By the standard described in Johnson v. Duffy (9th Cir. 1978) 588 F. 2d 740, 743-44, unquestionably these are proper party defendants.

[*20] For example, at Respondent, Gibbs, urgings Petitioner was sentenced to jail for a patently proper invocation of the Fifth Amendment (A.p. 198-215); Respondents procured the judge to sign an ex parte order permitting contempt papers to be served by mail (A. p. 135-136). An act contrary to California law See Brophy v. Industrial Accident Commission 46 CA 2d 278, C.C.P. 1016; Respondents then obtained a bench warrant in connection with proceeding re the $2,500.00 sanctions, which recited "Bail is set at $50,000 cash only"! (A. 157-158), an act also contrary to California law, See Cal. Penal Code 1270, 1275, Cal. Const. Art 1, Sec. 12. Respondents were at all times instigators of these events and the judges were most willing participants.

THE SUCCESSIVE ASSESSMENTS OF PUNITIVE DAMAGES AND SANCTIONS AGAINST PETITIONER CONSTITUTED PALPABLE ABUSES OF JUDICIAL AUTHORITY

By the express terms of F.R.C.P. Rule 11, sanctions may only be imposed if the pleadings are in violation of the rule...that is, that they are not "warranted by existing law, nor by any good faith argument for extention or modification or reversal of existing law". Under the terms of California law, sanctions for "frivolous" proceedings may be assessed only if they are such that any reasonable person would see it was utterly devoid of merit. Otworth v. So. Pacific Transportation (1985) 166 CA 3d 452, 212 Cal Rptr 743.

As has been pointed out above, the appeal from the Arbitrator's award was so meritorious that Petitioner clearly ought to have won on any one of several grounds. Moreover, she was entitled to have the judgment vacated without even having to file formal papers in that it was "void on its face".

That two successive courts have seen fit to levy huge fines under these circumstances is highly suggestive of bad faith, malice, and/or even political motivations, particularly on the part of the Alameda County Superior Court Appellate Panel.

The District Court's levy of double the amount of fees and costs accounted for (A. p. 15-17, 189) was clearly improper and unwarranted particularly relative to Petitioner's collateral attack in U.S. District Court on jurisdictional grounds. The remainder of Petitioner's action was wholly analogous to and substantiated by the Robinson cases, especially when they were all Ninth Circuit cases. Petitioner's right to rely on these cases and on cases like Wood v. Conneault Lake Park (supra) was reinforced when the U.S. Supreme Court reviewed the Robinson case and refused to overturn it on jurisdictional grounds. These cases alone would be sufficient to insure

that no sanctions (let alone huge sanctions) would be appropriate in that her action was simply not "clearly barred by unambiguous case law". Gilmer v. City of Cleveland (D.C. Ohio, 1985) 617 F. Supp. 985.

For a U.S. Circuit Court to have then affirmed these large sanctions by a decision which misstated the record relative to Petitioner's grounds, ignored all of the Robinson cases, miscited McNair and Sunshine, invented new, wholly unsubstantiated rules for Arbitrations and then hid the mess in a "disposition .... not appropriate for publication", would hopefully seem to involve the requisite degree of "departure from the accepted and usual course of judicial proceedings" as to call for U.S. Supreme supervision. Otherwise, it surely seems that these judges may inflict their awesome powers on individual litigants as they please to and on any basis they choose. If what occurred here is in harmony with the "accepted and usual" then indeed our system is not working

and is being used intermittently as a vehicle of oppression, with the litigant having no means of recourse.

It would surely seem that the punitive damages, and the within successive awards of substantial sanctions suffered by Petitioner would not only violate substantive due process, but would likewise violate Petitioner's Eighth Amendment (made applicable to the states by the Fourteenth Amendment) rights to be free of excessive fines and penalties arbitrarily imposed.

CONCLUSION:

To hold that a U.S. District Court may not reverse or modify a final, reasoned decision of a Supreme Court of a state regarding a constitutional issue, is reasonable and in keeping with the fundamentals of federalism and comity. Indeed, why would a single federal trial judge be better able to interpret our constitution than would a state's supreme court?

However, to expand that prohibition to encompass any final state judgment, whether or not any federal constitutional issue was ever recognized, addressed, or decided, is to deny a victim of state court abuses any viable remedy.

With our expanded population and huge case loads inflicted upon courts at every level, such abuses are bound to occur with increasing frequency. By the same token, that same massive case load confronts the U.S. Supreme Court, and effectively precludes it from offering individual litigants any recourse from judicial abuses as a practical matter.

The proper role of the U.S. District Courts relative to final state judgments assailed on constitutional grounds must therefore involve striking a balance. Indeed, U.S. District Courts cannot be expected to entertain "horizontal appeals" from the state's courts, especially when most disputes would likely involve "mere error"

dressed in "constitutional" garb.

However, if a litigant's constitutional rights are to be actually "guaranteed", then U.S. District Courts ought not to be limited to jurisdictional or procedural defects. In point of fact, a lack of substantive due process can give rise to even more unconscionable results, just as occurred here. Indeed, when laypeople speak of "justice", they usually refer to substantive due process. Hence, some jurisdiction over violations of substantive due process which result in unconscionable judgments should be given to U.S. District Courts.

As has been herein pointed out, the U.S. Supreme Court has already enunciated standards by which errors in a judgment can offend substantive due process and thereby assume a "constitutional dimension".

When and if a state court judgment involves errors of that magnitude, (as exemplified by what occurred here) then a U.S. District Court should be required to

assume jurisdiction. Given what appears to be the pervasive bias and lack of objectivity this Petitioner confronted at every juncture, it would surely seem the U.S. Supreme Court need not concern itself with U.S. District Judges unnecessarily usurping state judges.

On the contrary, when confronted by judicial misconduct, it is more likely that judges would typically react just as have the within judges. They were determined to quickly rid themselves of a distasteful case[*21] fraught with judicial politics, without regard to the consequences to the Petitioner, who has had to perform thousands of hours in legal services trying to vindicate herself, while at the same time suffering the on-going collection proceedings of these respondents who have turned her into a fugitive and have ruined her law practice.

---

*21 Not only was each judge, in turn, utterly resolved to just get rid of her case, but their desire was to punish this "audacious" (A. p. 192) woman lawyer and put her in her place by heavy fines for having persisted in proceedings which called attention to what their judicial colleagues had done.

Hence, the far greater likelihood is that, especially in such extreme instances of judicial misconduct (as here), judicial politics would weigh so heavily as to more likely result in unlawful abdication of constitutional duty. * 22

Unless the U. S. Supreme Court establishes a standard by which the U. S. District Courts can exercise jurisdiction to protect litigants from patent abuses of authority by state court judges, there will be no realistic opportunity of realizing the worthwhile goals enunciated in Mitchum (supra). Certainly, the vehicle through which the high court could best enunciate these standards, would be a case which involved multiple examples of egregious error and

---

* 22 The Court is reminded that although Petitioner's case involved a classic case of a "judgment void on its face", when she moved for a Summary Reversal and Stay, she was not only summarily denied any relief, but she was actually threatened with further sanctions by two more Ninth Circuit judges!! (A. p. 222) So disdainful were they of Petitioner's action, they then also sought to deny her any oral argument (A. p. 232)

judicial misconduct (as presented herein). Not only would this Petitioner then have her deserved day in court, but our so-called "constitutional guarantees" will not be mere theories and ideals.

Respectfully submitted,

Patricia M. Bourke

FILED
FEB. 6, 1990
CATHY A. CATTERSON, CLERK
U. S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Patricia M. Bourke, Plaintiff-Appellant v- Jeanne Schuman; William Gibbs; David Himmelman, and DOES I-X. Defendants-Appellees.	) No.88-2446)D.C. No. CV-87-5134-JPV)MEMORANDUM*

Appeal from the United States District Court for the Northern District of Calilfornia John P. Vukasin, Jr., District Judge Presiding

Argued and Submitted December 13, 1989
San Francisco, California

Before: Wright, Hug, and Leavy, Circuit Judges

I.

Patricia Bourke, an attorney appearing pro se, appeals the district court's dismissal of her action as frivolous and

---

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

harassing under Fed. R. Civ. P. 11, and the imposition of Rule 11 sanctions in the amount of $5,000. Bourke sued her former employee, Jeanne Schuman, Schuman's present employer, David Himmelman, and Schuman's attorney, William Gibbs, under 42 U.S.C. Sec. 1983 for alleged constitutional wrongs connected with an earlier state court proceeding. We affirm.

II.

Rule 11 prohibits "frivolous filings" and using "judicial procedures as a weapon for person or economic harassment." Zaldivar v. City of Los Angeles, 780 F. 2d 823, 830 (9th Cir. 1986). The district court dismissed Bourke's complaint as "frivolous" and also found that Bourke was "simply trying to harass and vex the defendants" and that the court system (was) being used improperly." The district court thus relied upon both the "frivolousness" clause and the "improper purpose" clause of Rule 11. See id.

To determine whether a filing is

frivolous or made for an improper purpose in violation of Rule 11, an objective standard of reasonableness is applied. Hudson v. Moore Business Forms, Inc., 836 F. 2d 1156, 1159 (9th Cir. 1987). With frivolousness, the key question is whether the pleading states an arguable claim--not whether the pleader is correct in her perception of the law. Id.

A. Frivolousness

We find that Bourke could not state an arguable claim because the district court had no subject matter jurisdiction to review the state court's decisions. A federal district court, as a court of original jurisdiction, has no authority to review the final determinations of a state court in judicial proceedings. District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 476 (1983); Worldwide Church of God v. McNair, 805 F. 2d 888, 890 (9th Cir. 1986) This doctrine applies even when the challenge to the state court decision involves alleged deprivations

of due process or equal protection. Feldman, 460 U.S. at 484-85.

The federal action is an impermissible appeal from the state court decision if the constitutional claims presented to the district court are "inextricably intertwined" with the state decision. McNair, 805 F. 2d at 892 (quoting Feldman, 460 U.S. at 483-84 n. 16). Federal constitutional issues are inextricably intertwined with the state court judgment if the district court could not evaluate the plaintiff's constitutional claims conducting a review of the state court determinations. Id.

Bourke alleged six claims for relief under 42 U.S.C. Sec. 1983. Specifically, Bourke alleged: (1) that the state arbitration award was void because the arbitrator lacked subject matter jurisdiction and deprived her of her property without due process; (2) that the arbitrator made "gross legal errors" violating her right to due process, and that his award of punitive

damages to Schuman on the defamation claim violated Bourke's First Amendment rights because her statements were "truthful;" (3) that defendants's continued opposition to Bourke's attempts to vacate the arbitrator's award caused her injury; (4) that defendants "engaged in a conspiracy to deprive (Bourke) of her civil rights" by opposing her attempts to vacate the arbitrator's award; (5) that she was denied "equal protection of the laws by reason of gender;" (6) and that the state appellate division's imposition of $2,500 sanctions was erroneous.

As to her first two claims, the district court could not determine whether Bourke was denied due process without first reviewing the arbitrator's decision or those of the myriad state courts upholding the arbitrator's decision. Similarly, as to her sixth claim, the federal court could not decide that the state appellate division erroneously imposed sanctions without directly reviewing that court's decision.

These claims are inextricably intertwined with the state court decision and the district court therefore had no subject matter to decide them. 1/ See McNair, 805 F. 2d at 892.

Bourke's third and fourth claims are also deficient. Bourke cannot state a constitutional violation based on the defendants' opposition to her attempts to vacate the arbitrator's decision. See Dooley v. Reiss, 736 F. 2d 1392, 1394-95 (9th Cir.)(because plaintiffs were not prevented from pursuing relief in a civil action, they suffered no deprivation based on defendants' attempts to conceal evidence in that litigation), cert denied, 469 U.S. 1038 (1984).

---

*1 Indeed, as relief, Bourke sought a judgment declaring the arbitrator's award "void by reason of a lack of subject matter jurisdiction," and a vacation of the $2,500 sanction imposed by the state appellate division. Such requests provide strong indication that Bourke is asking the federal court to act as an appellate court for decisions by the state courts. This the federal court cannot do. See McNair, 805 F. 2d at 892.

Finally, while the basis for Bourke's equal protection claim is unclear, it appears that Bourke is asserting that she was denied equal protection either because (sic) the arbitrator's decision, or the defendants' opposition to her attempts to overturn that decision, were motivated by gender-based animus. In either case, to the extent Bourke has requested the district court to scrutinize the arbitrator's decision in her case, the district court lacked subject matter jurisdiction. See Allah v. Superior Court of the State of California, Los Angeles County, 871 F. 2d 887, 891 (9th Cir. 1989).

The proper court in which to obtain review of state court determinations is the United States Supreme Court. 28 U.S.C. 1257; McNair, 805 F. 2d at 890. The Supreme Court has already denied certiorari in this case.

B. Improper Purpose

The district court also correctly determined that Bourke's complaint was filed for an improper purpose. "Harassment under

Rule 11 focuses upon the improper purpose of the signer, objectively tested, rather than the consequences of the signer's act, subjectively viewed by the signer's opponent." Zaldivar, 780 F. 2d 832. Thus, conduct forming the basis of the charge of harassment "must do more than bother, annoy or vex the complaining party " Id. at 831-32.

A claim of harassment may be sustained on the basis of successive filings if the same parties are involved in the successive claim and the same issues were resolved in the earlier action. Id. at 834. In addition, the absence of any support for the amount of damages claimed may be an indication of "bad faith". See Bright v. Bechtel Petroleum (780 F. 2d 766, 772 n. 8 (9th Cir. 1986). Applying these standards, the district court correctly concluded that Bourke's complaint was filed for an improper purpose.

Here, Bourke's federal action is in large part successive. Schuman was a party

in both the state and federal actions and a number of Bourke's claims were resolved in the state courts. See Zaldivar, 780 F. 2d at 832. In addition, Bourke's prayer for relief, in which she requested $1.05 millilon compensatory and $600,000 punitive damages to compensate her for paying a $14,500 judgment, is a strong indication of the retaliatory and bad faith nature of this action. See Bright, 780 F. 2d at 772 n. 8.

III.

Once a Rule 11 violation has been found, sanctions are mandatory. Golden Eagle Distrib. Corp. v. Burroughs Corp. 801 F. 2d. 1531, 1540 (9th Cir. 1986). The district court has wide discretion in determining the appropriate sanction for a Rule 11 violation. Id. at 1538.

Given the troubling history of this case, the fact that Bourke has been sanctioned for bringing similar claims in the state courts and yet continues to attempt to litigate them, the district court did not

abuse its discretion in imposing $5,000 sanctions against Bourke.

IV.

Although we affirm the district court on other grounds, we address Bourke's arguments with the hope of finally ending this 'litigation. First, Bourke's section 1983 claims are frivolous because she has not shown that the defendants acted under color of state law. See Tower v. Glover, 467 U.S. 914, 920 (1984). Private individuals are not subject to suit under section 1983 unless engaged in a conspiracy with public officials. Id. AlthoughSchuman, Gibbs and Himmelman are attorneys, they are private persons for the purposes of section 1983. See Polk County v. Dodson 454 U.S. 312, 325 (1981). Moreover, the prove conspiracy under section 1983, an agreement or meeting of the minds to violate the plaintiff's constitutional rights must be shown. See Woodrum v. Woodward County, 866 F. 2d 1121, 1126 (9th Cir. 1989)

Here Bourke has not alleged any facts to show that the defendants conspired with any state actors. Her complaint contains specific allegations which demonstrate that the section 1983 violation she complains of resulted not from any conspiracy between the defendants and the arbitrator or other state officials but because the defendants "deliberately misled the courts as to the facts and law at every opportunity". The only reference to "conspiracy" she makes in the complaint involves an allegation among the defendants, not between the defendants and state officials. Thus, the express allegations of her complaint belie the existence of any conspiracy between the defendants and any state official.

Finally, the genesis of Bourke's complaint is that the arbitrator used letters against Bourke that Bourke herself had submitted into evidence. Bourke presents a technical argument that the arbitrator improperly used this evidence against her,

since defendant-Schuman did not move to have these letters considered in her cross-complaint. First, we note that Bourke cites no authority to support her contention that evidence cannot be used against the party who submits it. Second, Bourke's admission that she 'agreed to be a part of binding arbitration means that she agreed to abide by the rules of arbitration. An arbitrator is not bound by the formal rules of procedure and evidence. Sunshine Mining Co. v. United Steelworkers of America, 823 F. 2d 1289, 1295 (9th Cir. 1987). Thus, an arbitrator may admit and rely on evidence inadmissable under the federal rules, as long as the parties received a fundamentally fair hearing. Id. We find that Bourke received a fair hearing and even if the arbitrator did rely on letters submitted by Bourke, such reliance in no way invalidated the Arbitrator's holding.

AFFIRMED.

FILED
APR. 20, 1990
CATHY A. CATTERSON, CLERK
U. S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Patricia M. Bourke,	)
	)
Plaintiff-Appellant,	) No.88-2446
	)
v-	)
	)D.C. No.
Jeanne Schuman; William Gibbs; David Himmelman, and DOES I-X.	)CV-87-5134-JPV
	)
Defendants-Appellees.	)
	)

Appeal from the United States District Court for the Northern District of Calilfornia

Before: Wright, Hug, and Leavy, Circuit Judges

The panel as constitued in the above case has voted to deny the petition for rehearing. Judges Hug and Leavy have voted to reject the suggestion for a rehearing en banc, and Judge Wright has recommended rejection of the suggestion for rehearing en banc.

The full court has been advised of the en banc suggestion and no active judge of the

court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

FILED 3/1/88

PATRICIA M. BOURKE
Attorney at Law
P. O. Box 415
Walnut Creek, California
PH: (415) 944-4718

Attorney/Plaintiff In Pro Per

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

PATRICIA M. BOURKE, Plaintiff, vs. JEANNE SCHUMAN, WILLIAM GIBBS DAVID HIMMELMAN, DOE I-X Defendants.	No. C 87-5134 JPV --- ORDER DENYING PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER, GRANTING DEFENDANT'S MOTION TO DISMISS PURSUANT TO RULE 11, F.R.Civ. P., REQUIRING PRE-FILING REVIEW PRIOR TO FUTURE FILINGS OF PLAINTIFF

Plaintiff's motion for a temporary restraining order and defendants' motion to dismiss and for sanctions pursuant to Rule 11, F.R.Civ. P., and for an injunction enjoining plaintiff from filing any further actions against defendants arising out of the facts of this case, came on

regularly for hearing before this Court on Feb. 25, 1988. Gregory Stout, Esquire appeared on behalf of plaintiffs. William Gibbs, Esquire, appeared on behalf of himself in prop per and on behalf of defendants Jeanne Schuman and William Himmelman. The Court has reviewed the pleadings submitted in support of and in opposition to the above motions and heard oral argument of counsel.

Because of the extraordinary history of this case and good cause appearing, IT IS HEREBY ORDERED that:

1). Plaintiff's motion for a temporary restraining order is DENIED;

2). Defendants' motion to dismiss plaintiff's complaint is GRANTED. Plaintiff's complaint is DISMISSED pursuant to Rule 11, F.R.Civ.P., as frivolous and because of plaintiff's ulterior purposes of harassment in filing this action. See Rhinehart v. Stauffer, 638 F. 2d 1169, 1171 (9th Cir., 1980);

3. Sanctions in the amount of $5,000.00 are imposed against plaintiff Patricia M. Bourke, payable to defendants, for her violation of Rule 11, F.R.Civ.P.;

4. Plaintiff may not file any further actions against defendants herein in the United States District Court for the Northern District of California unless plaintiff's complaint is first submitted to the General Duty Judge for pre-filing review and approval

Dated: 2/1/88

J. P. Vukasin, Jr.
United States District Judge

SUPERIOR COURT OF CALIFORNIA
COUNTY OF ALAMEDA

Plaintiff

Patricia M. Bourke

FILED JUNE 24, 1985

OPE # 389281

Defendant

Jeanne Schuman, et. al.

AWARD OF ARBITRATOR

The undersigned arbitrator, having been duly assigned by Alameda County Superior Court, and having heard and considered the evidence of the parties in the above referenced cause on June 11, 1985, awards in full and final settlement of all claims submitted to arbitration under California Rules of Court, Rule 1615 as follows:

JUDGMENT IN FAVOR OF ( ) PLAINTIFF

(XX)CROSS-CROSSCOMPLAINANT

AGAINST ( )DEFENDANT (XX)CROSS-DEFENDANT

in the sum of $ Fourteen Thousand Two Hundred Seventy One Dollars and eighty six cents.

(See attached Memorandum of Decision)

Dated June 21, 1985

John M. True, III
Arbitrator

AWARD OF ARBITRATOR ENTERED AS JUDGMENT IN COMPLIANCE WITH RULE 1615(c) CALIFORNIA RULES OF COURT ON (date) July 30, 1985 in Judgment Book No. page no.

George R. Dickey, Clerk By G. King
Administrator Deputy

MEMORANDUM OF DECISION

I

Plaintiff Patricia Bourke employed Defendant Jeanne Schuman as an associate attorney in her law offices pursuant to an oral contract of employment. At all material times each was a licensed member of the California Bar. Schuman worked for Bourke pursuant to at least three different employment arrangments. At first, she was

paid $1,000.00 per month for more or less full time work. Later her compensation was changed frommonthly salary to an hourly wage, again for essentially full-time work. Still later she began subletting an office from Bourke and was paid at a slightly higher hourly rate for any work she did on Bourke's cases. From the outset, even while employed "full-time" by Plaintiff, Schuman worked on some of her own cases including court-appointed criminal matters and referrals from other attorneys. Two such referrals, social security cases involving Defendants Staska and Hornof, prompted the events giving rise to this lawsuit.

The parties apparently agreed from the outset that certain cases could be "referred" by Defendant to Plaintiff's office even though Schuman was an employee of Bourke. Schuman now contends that it was agreed that <u>any</u> case so referred would entitle her to a referral fee of anywhere

from 25% to 33 1/3%, the exact amount or percentage to be decided on a case-by-case basis. Bourke contends, on the other hand, that only "profitable" cases would be subject to a referral fee, and that the amount and/or percentage of those fees would be decided case-by-case.

During 1980, while Schuman was employed by Bourke, two individuals, Staska and Hornof, were referred separately to Schuman by a friend. Staska and Hornof wished legal assistance in obtaining social security benefits that had been denied the. Schuman agreed to represent them and had each of them execute a retainer agreement using the form then in use in Bourke's office.-[1/]

1/ Only Staska's retainer agreement was produced at the hearing. Bourke's cause of action against Staska has been dismissed with prejudice. Hornof, who is still in the case, appeared with counsel and declined to produce any part of his file asserting attorney-client privilege. Based on all the evidence, however, it is concluded that Schuman's and Hornof's attorney-client relationship was memoralized on a form similar to that used by Staska and Schuman.

On each occasion Schuman informed Bourke that ~~she was~~ taking in those cases, and obtained her approval for doing so. She also claims that in each case she told Bourke that she would turn over any fee from the case to the Bourke office less a referral fee to be decided upon according to their agreement. Bourke, she says, agreed.

During 1980 and 1981 she processed both cases successfully and obtained fees in the amount of $1,251.45 from the Staska case and $628.00 from the Hornof case. These fees were paid in due course directly to Schuman by the U.S. Treasury pursuant to her petition for her statutory share of 25% of the total recovery to her clients.

The record is clear that in each instance she attempted to give Bourke these fees. Before addressing the transactions by which she made these attempts, however, the deterioration of the professional relationship between Bourke and Schuman must be described.

As of March 1, 1981, Schuman had ceased being an employee of Bourke's and had begun subletting an office from Bourke as described above. At this time although the Staska case had been finished, fees had not been awarded. It is not entirely clear if the Hornof case had been completed but no fees had been generated. Pursuant to an oral rental agreement Schuman paid Bourke $91.00 for a furnished office including the use of a receiptionist, a typewriter, copier and telephone (actual telephone and copier charges were to be reimbursed to Bourke). During March and the first part of April, 1981, she worked on her own cases and performed services for Bourke on certain cases pursuant to the employment arrangement described above. She submitted periodic vouchers for payment of these services. Although she paid rent in March, it is undisputed that she did not pay Bourke rent, in any amount, and on April 1, 1981, nor did she reimburse Bourke for telephone or copier charges.

On April 4, 1981 Bourke served Schuman with a 30-day notice to quit the office. Between that date and April 23, 1981 the two parties argued about various aspects of their situation. Bourke says that Schuman abused her privilege to use office equipment such as the typewriter and that she was not getting work done on cases as she had promised. Schuman says that Bourke interfered with her use of her leased office, with her attempts to get work done and with her clients.

On April 23, 1981, Bourke refused to pay Schuman's most recent voucher in the amount of $305.13 for services performed. She wrote a three page letter to Schuman accusing her of failing to get work done, of having a "bad, resentful, immature attitude", of uttering "dishonest threats" and of other wrongs. She also obtained both the Staska and Hornof files and wrote to both clients asserting that Schuman was no longer in her employ and had "no further authorization or authority to represent (either of them) in

any way." She instructed her secretary to secrete the files in her (Bourke's) desk when she had finished typing the letters referred to above.

The secretary apparently neglected to do this, however, and left the files on top of her desk. Schuman happened upon the files while both Bourke and her secretary were out and discovered the actions Bourke had taken. She retrieved the files and took them to her own office.

When Bourke returned and found the files missing she went into Schuman's office where a loud argument ensued. Bourke accused Schuman of "theft" and called her a "kike" and a "bitch". She also called the Oakland Police and the California Bar Association. The police responded but declined to intervene. That afternoon Schuman reached the conclusion that she would have to leave her office. She did do in the evening after Bourke had left, moving into another office in the same building.

The following day Schuman wrote Bourke returning keys to her office. She also accused Bourke of interfering with her quiet enjoyment of her subleased space and of harassing her.

Shortly thereafter, on June 1, 1981 Schuman paid Bourke the sum of $946.32 which represented the Staska fee of $1,251.45 less $305.13 which Schuman claimed Bourke owed her for the final voucher referred to above. Bourke negotiated this check, but when Schuman wrote her a second check on May 21, 1982 in the amount of $653.00 for the entire amount of the Hornof fee ($628.00 plus $25.00 medical bill) Bourke returned it and the instant litigation commenced.

Between the date Schuman moved out and the date this lawsuit was served, however, Bourke pursued her perceived grievance against Schuman with what can only be described as ferocious energy. She commenced proceeedings against Schuman

before the Bar Association as noted above. She wrote repeated and lengthy letters to Staska and Hornof in which she described Schuman in decidedly unflattering terms. She threatened and ultimately commenced legal action against them when they declined to cooperate with her. She conducted an extremely lengthy and voluble correspondence with the Social Security Administration which was again marked by repeated and extremely negative descriptions of Schuman. She contacted Schuman's next employer, again negatively characterizing Schuman and even threatening to sue that firm. She also called another person who she apparently thought might be interested in employing Schuman and volunteered the information that "she could not in all good conscience give (Ms. Schuman) a good recommendation." She even wrote to congressional representatives including uncomplimentary characterizations of Schuman. The record herein contains at

least fifteen separate pieces of correspondence from Bourke to someone other than Schuman, each one containing at least one severely derogatory comment about Schuman. "Spiteful," "impudent," "arrogant," "childish," little embezzler," "thiéf," and "blackmailer" are but a few examples of Bourke's descriptive terminology. As another example, in an April 28, 1981 letter to Social Security Administration she made, among many, many other assertions, the statement that "That young woman attorney is absolutely uncollectible and owns barely the clothes on her back."

II

ISSUES

Bourke filed a complaint against Schuman, Staska, and Hornof. Against Schuman she complained of:

1). Wrongful interference with her (Bourke's) contractual relationship with Staska and Hornof;

2). Breach of Contract (apparently both the oral sublease and the oral agreement as to the Staska and Hornof fees);

3). Conversion of the Staska and Hornof fees and files.

Against Staska and Hornof she complained of "willlfully and deliberately assisting" Schuman in converting money belonging to Plaintiff.

Schuman cross-complained against Bourke for:

1). Breach of the oral agreement to pay a referral fee on the Staska case;

2). Breach of the oral agreement to pay a referral fee on the Hornof case;

3). Breach of the oral contract of employment;

4). Defamation; and

5). Intentional infliction of emotional distress.

Each party has asked for damages based on the wrongs complained of and each has submitted some proof in respect to damages claimed.

III

DISCUSSION

None of Bourke's claims against Schuman based on the Hornof and Staska cases survives scrutiny. Moreover, her pursuit of Schuman and the fees bears all the indicia of a personal vendetta out of all proportion to the amounts in dispute. In the considered opinion of the undersigned, she has used this forum, as she has every other available to her, to vent her spleen against Schuman in a fashion which reflects dismally on her status as a legal practitioner. The award herein reflects, among other things, the profound sense of outrage felt by the undersigned at the intemperate, unwarranted, and relentlessly hostile attacks conducted by Bourke on literally every person connected with this unfortunate episode. The spectacle of elderly social security pensioners being dragged as defendants into a bitter wrangle over a few hundred dollars in attorney fees

is one of the most disheartening imaginable to anyone who believes that the law is to be used for mankind's betterment.

1. Bourke's Claims

It is found that Schuman did not, as Bourke contends, wrongfully interfere with any attorney-client relationship between Bourke and Staska or Hornof. None existed. Both clients so informed Bourke when she asked. Mr. Hornof testified repeatedly at this hearing that "Jeanne Schuman is my lawyer", and that he wanted nothing to do with Bourke. Indeed, Bourke never had anything to do with either his or Staska's case. She freely admitted that she knew nothing of the law governing their claims and that she never even met Staska. Under the circumstances it cannot be found that Bourke had any contractual relationship with Staska or Hornof to be interfered with.

It is similarly clear that Schuman did not breach her agreement to give Bourke the

fees owing on the Staska and Hornof cases. Nor did she convert the fees to her own use. She did attempt to claim that she was owed part of the fees as a referral bonus, but manifestly desisted in that endeavor prior to being sued. Staska's fees were paid and accepted by Bourke even with the deduction for Schuman's final payment for services to Bourke's cases./[2] The Hornof fees were tendered but rejected./[3]

2/Bourke claims that, because of poor quality of Schuman's work in the relevant period, she had no obligation to pay the voucher and Schuman's withholding of the voucher amount from the Staska check was wrongful. Bourke's proof in this regard was wholly unconvincing.

3/Schuman wrote an endorsement on her check to Bourke for the Hornof fees in an apparent attempt to bring the dispute to resolution. Bourke claimed that this "restrictive endorsement" entitled her to reject the tender. This claim is undermined by 1) the circumstance that Bourke had already prepared and was ready to serve this lawsuit (indeed she returned the check with the summons and complaint), and 2) her admission at the hearing that she could, and would have negotiated the particular check introduced in evidence, but that, somehow, Schuman had substituted

Bourke's claim that Schuman, aided by Staska and Hornof, converted the client files must fail as well. It is abundantly clear that the actual attorney-client relationship existed between Schuman on the one hand and Staska and Hornof on the other. Schuman met and worked with the client, made the appearances and did whatever else was necessary to secure their benefits. Bourke had no interest in the cases or relationship to the clients. As defendants correctly point out, the actual case files ultimately belong to the clients and it is they who have the right to determine their disposition. Schuman had an obligation to ensure that Bourke got her share of the fees from those cases, and she fulfilled that obligation. Bourke's claim to an interest in the actual client files, boiled down to essence, amounts to an

---

3* contd. for purposes of this litigation another check with less restrictive language on it for the one actually sent to her. The assertion is based on nothing more than her after-the-fact conjecture and falls of its own weight.

assertion of a property interest in the paper generaged in the cases that has virtually no meaning outside of her vendetta against Schuman. It would be standing the law on its head to find merit in it.

In light of the above finding, Bourke's cause of action against Staska and Hornof for "assisting" in the alleged conversion of their own files deserves no further comment.

The question of whether Schuman breached a duty owed to Bourke as a tenant is a closer one. She failed to pay rent on April 1, 1981 as required. Bourke claims that she also owed copying charges amounting to $8.00 and telephone charges amounting to $20.00, although she failed to substantiate either claim. Schuman asserts that Bourke's conduct at various times during the month of April so interfered with her tenancy as to constitute a constructive eviction. It is found, based

on the entire record that a constructive eviction did occur but that it did not take place until April 23, 1981, the day the police were called. Bourke is thus entitled to a pro rata share of the April rent in the amount of $470.00. Lacking proof she is entitled to nothing for either the telephone or copier charges.

2. Schuman's Cross-claims

As to Schuman's claims agains Bourke, much less need be said. Her testimony that she had an agreement for referral fees in the amount of at least 25% in the Staska and Hornof cases was credible based on all the circumstances, and Bourke's denial that this arrangment existed was not credible. It is found that she is entitled to $312.86 from the Staska case and $157.00 from the Hornof case for a total of $469.86.

Her contention that she had an oral contract of employment which Bourke breached is not persuasive. As of April 23, 1981, the date she moved out of her

office, she was no longer an employee of Bourke's. She did have a valid claim for the unpaid $305.00 voucher, but she had also failed to pay the required rent, as noted above. Thus, Bourke is obligated to pay the voucher sum, and it is found that Schuman lawfully withheld that amount from the Staska fees. But it cannot be concluded, in the face of Schuman's failure to pay rent, that the expenses involved in Schuman's relocation of her offices are chargeable to Bourke.

Schuman's contention that she has been defamed and that she has been the victim of intentional infliction of emotional distress are each meritorious and will be discussed briefly. First, as noted, Bourke has written and spoken to various persons and entities repeatedly about Schuman. Each of these communications has been studied carefully, and it is found that time and time again they contain utterances which are patently untrue, gratuituous,

malicious and decidedly injurious to Schuman's reputation as an attorney. The statements quoted in Part I above are but a very few selections from an unrelenting stream of invective that goes way beyond even the most agressive hyperbole which might be permitted an advocate. Bourke's claim that these statements were made in the course of or in preparation for litigation and therefore privileged is rejected. In the first place, many of them were made long before the litigation commenced. Second, Ms. Bourke has, by her intemperate and unjustifiable language, thoroughly abused and therefore lost the protection of any applicable privilege. Compensatory damages are awarded Schman in the amount of $2,500.00. It is found that Bourke's actions were malicious and oppressive. Punitive damages in the amount of $5,000 are thus awarded.

Similarly, it is abundantly clear that Bourke's behavior towards Schuman

throughout was sufficiently outrageous to constitute the tort of intentional infliction of emotional distress. Because of Bourke's conduct Schuman has had to explain herself to 1) the police, 2) the bar, 3) the Social Security Administration, 4)her clients, 5) her current employer, and 6) at least one other individual who hadn't been even thinking of employing her but who Bourke contacted anyway. She testified credibly that this caused her extreme fear, anxiety, loss of sleep, migraine headaches and other forms of severe discomfort. She is entitled to compensatory damages in the amount of $2,000.00. Once again it is found that Bourke's actions were oppressive and malicious. The sum of $5,000.00 in punitive damages is awarded.

AWARD

As discussed above, Bourke is entited to the sum of $70.00 against Schuman for rent from April 1 through April 23, 1981. Nothing is awarded on any other claim

against Schuman and nothing is awarded against either Staska or Hornof. Schuman has been holding the Hornof fee of $628.00 in her trust account since Bourke returned it to her. Bourke is entitled to have these amounts, totalling $698.00 set off from the amounts awarded Schuman described below.

Schuman is entitled to referral fees totalling $469.86 on the Staska and Hornof cases. Additionally she is entitled to the $305.00 owed on the April 22, 1981 voucher. Since she deducted that amount from the Staska payment, it need not be included here. Schuman is also awarded $2,500 in compensatory damages plus $5,000.00 in punitive damages in her defamation cause of action and $2,000.00 in compensatory damages plus $5,000.00 in punitive damages on her final cause of action.

Schuman is thus awarded a total of $14,969.86 against which Bourke may set off $698.00 for a net award to Schuman of $14,271.86.

Bourke is to pay each Defendants's costs.

Dated: June 21, 1985

s/John M. True
John M. True III
Arbitrator

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

Date: February 19, 1987 Appellate Dept.28

Hon. Benjamin Travis, P.J.
Winton McKibben, J.
Mark Eaton, J.

Jeffrey K. Jue, Deputy Clerk

PATRICIA M. BOURKE

Appellant,

vs-

JEANNE SCHUMAN

Respondent.

Appellate #
1460

NATURE OF PROCEEDINGS: Opinion

Action: 1460

Patricia M. Bourke (hereafter Bourke) filed a complaint against Jeanne Schuman (hereinafter Schuman). Schuman filed a cross-complaint against Bourke alleging five causes of action including one for defamation and one for intentional infliction of emotional distress. The matter was referred to John M. True, III, Esq. for binding arbitration. The

Arbitrator awarded Bourke $70.00 on one claim and denied recovery on the others. Schuman was to hold $628.00 of Bourke's money and Bourke was credited with $698.00 off set from the amount awarded Schuman. Schuman was also awarded $2,500 in compensatory damages plus $5,000.00 in punitive damages on her defamation cause of action and $2,000 in compensatory dmamages plus $5,00.00 (sic) in punitive damages on her intentional infliction of emotional distress cause of action. Schuman was thus awarded a total of $14,969.86 against Bourke which Bourke set off $698.00 a net award to Schuman of $14,271.86.

Bourke petitioned the Superior Court to vacate the Arbitration award and permit a trial de novo. The petition (motion) was denied. Thereafter Bourke had a hearing on a petition in Municipal Court on a petition to vacate the award and to permit a trial de novo. This petition was denied. Thereafter, Bourke petitioned for a

reconsideration of the motion. On December 6, 1985 this motion was heard and denied. Thereafter, an appeal was filed.

Bourke's notice of appeal does not specify whether the appeal is from the arbitrator's denial of her claims, the award on the Cross-Complaint, or both. Bourke did not pay the award on the Cross-Complaint. In her opening brief, Bourke stated that the appeal seeks to reverse an order denying a motion to vacate an Arbitration Award made against Appellant on a cross-complaint for defamation and the intentional infliction of emotional distress. Bourke's brief listed two issues for the court.

1. Whether Appellant had an attorney client relationship with two social security claimants.

2. Whether Respondent serviced these clients as an employee of Appellant.

On page nine of her brief, Bourke argues defamation - further gross errors of law on the face of the decision. Bourke then

argues truth, priviledge (sic) and qualified privilege. The face of the decision shows that Bourke accused Schuman of theft and called her a kike and a bitch. There were fifteen separate pieces of correspondence from Bourke to someone other than Schuman each one containing at least one severely degrogatory comment about Schuman, spiteful, imprudent, arrogant, childish, little embezzler, thief and blackmailer are but a few examples of Bourke's descriptive terminology. The decision states that the communications by Bourke contained utterances which are patently untrue, gratuous, malicious, and decidedly injurious to Schuman's reputation as an attorney. The decision further stated that Bourke's claim that these statements were made in the course of or preperation(sic) for litigation and therfore(sic) privileged is rejected. The statements were made long before the litigation commenced. Further Bourke has by her intemperate and unjustifiable

language thoroughly abused and therfore (sic) lost the protection of any applicable privilege.

Bourke's brief states that the same communications were used as a basis for the award of damages for intentional infliction of emotional distress. The brief argues, "However, the law is quite clear that such privileges cannot be abrogated simply by a change of labels. Otherwise, the privilege accorded would be defeated."

The arbitrator found that the statements of Bourke were defamatory. Bourke has the burden of establishing the defense of truth or privilege, Civil Code 47 lists Publications which are privileged. The only possible subsection would be section 3. This section requires that the acts be done without malice. The arbitrator found that the statements went beyond the bounds of any privilege. Bourke has presented no evidence to show that statements were privileged. There is no known privilege that authorizes the language used by

Bourke. Further, the arbitrator found that some of the statements were made prior to a time when any action was pending. Some of the statements were not related to any proceeding whatsoever. The claim of privilege although alleged has not been established for all of the defamatory statements.

Sanctions for an appeal which is partially frivolous are appropriate if the frivolous claims are a significant and material part of the appeal Maple Properties V. Harris 158 CA 3d 997 205 Cal Rptr 532 (sic). Here the defamation claim and the claim for intentional infliction of emotional distress are severalble (sic) and distinct from the other causes of action.

The question then becomes whether these two claims can be found to be frivolous when measured by an objective and subjective standard. We find that the appeal of the defamation claim and the claim for intentional infliction of emotional distress were frivolous.

The arbitrator found that Bourke had written and spoken to various persons and entities repeatedly about Schuman. He studied each of these communications and found that time and time again they contain utterances which are patently untrue, gratitutious, malicious .and decidedly injurious to Schuman's reputation as an attorney. Bourke has pointed to nothing in the record upon which she basis any claim of the truth of the utterances.

The claim of privilege under Civil Code 47(3) for litigation wa aiso rejected by the arbitrator because the statements were made prior to the litigation and also because the statements exceeded the bounds of any applicable privilege. Bourke has pointed to nothing in the record to show anything different from these findings. No reasonable person could expect to prevail without showing some error in the record. Bourke discussed truth and privilege in the abstract and never related it to this case.

The appeal of the defamation claim and the

claim of intentional infliction of emotional distress are totally and completely devoid of merit and therefore frivolous.

The arbitrator found that Bourke's actions were malicious and oppressive. This malice was further indicated by the subsequent petitions and the filing of this appeal of the defamation and intentional infliction of emotional distress. We find that the motive for filing these two appeals was an improper motive and represents a time-consuming and disruptive vie of the judicial process In Re Marraige (sic) of Flaherty 31 C. 3d 637; 183 Cal Rptr 508.

Sanctions are imposed in the sum of $2,500.00.

Remittitur to issue.

Presiding Judge S/Benjamin Travis

We concur: S/ Winton McKibben

S/ Mark Eaton

FILED
May 30, 1989
Court of Appeal - First Dist.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION FIVE

Patricia M. Bourke,

Petitioner,

vs-

Oakland-Piedmont Municipal Court,

Respondent.

A043520
Alameda Sup. Ct. No. 639042-6

Jeanne Schuman,

Real Party in Interest /
/

Patricia M. Bourke purports to appeal from a superior court order partially denying a Writ of Prohibition directed to a municipal court. We dismiss the appeal on the ground the order is nonappealable.

The writ petition challenged a postjudgment municipal court contempt order arising from Bourke's failure to pay sanctions imposed by the appellate department

of the superior court for the prosecution of a frivolous appeal. The superior court granted the petition as to the contempt citation but denied the petition to the extent Bourke asserted that the underlying judgment was void on its face. Such an order is made nonappealable by Code of Civil Procedure section 904.1, subdivision (a)(4), which prohibits an appeal from "a judgment granting or denying a petition for issuance of a writ of mandamus or prohibition directed to a municipal court or a justice court or the judge or judges thereof which relates to a matter pending in the municipal or justice court."

Bourke contends the statutory rule against appeal is inapplicable becuase the underlying municipal court judgment is final, so that the writ petition did not relate to a matter "pending" in the municipal court. But the writ petition related to enforcement of the sanctions order by the appellate department of the superior court, and the

matter of such enforcement is still pending in that sanctions remain unpaid.

Bourke could have challenged the order by petition to this court for an extraordinary writ. (Code Civ. Proc., Sec. 904.1, subd. (a)(4).) She has not done so, and we decline to treat the appeal as a writ petition (see Heldt v. Municipal Court (1985) 163 CA 3d 532, 534, fn.1), since the substantive arguments asserted by Bourke are patently meritless.

The appeal is dismissed.

s/ King, J.

We concur:

s/Low, P. J.

s/Haning, J.

MUNICIPAL COURT FOR THE OAKLAND-PIEDMONT JUDICIAL DISTRICT, COUNTY OF ALAMEDA, STATE OF CALIFORNIA

BOURKE, Plaintiff,	)	No. 389281
vs-	)	
SCHUMAN, et al	)	Minutes
Defendants.	)	

Department #2 Hon. Lewis P. May, Judge

Case called for trial - Jury

Plaintiff appearing: Bourke: Attorney Linda Chester, and Pro Per

Defendant(s) appearing: Shuman (sic), Attorney Gibbs and pro per

Hornof: Attorney G. R. Wright

Staska: Attorney S. W. Blackfield

Motion of defense counsel for defendant Staska to abate action be and is granted and for withdrawal of attorney.

Pursuant to stipulation all parties present, the Court orders matter submitted to binding arbitration.

Minutes of Nov. 5, 1984

George R. Dickey, Clerk-Administrator

By: M. Clark - Deputy Clerk.

(Proof of Service Omitted)

Patricia M. Bourke
Attorney at Law
6572 Lucas Ave.
Oakland, Ca.

William Gibbs, Esq.
449 15th St. Ste.406
Oakland, Ca. 94612

Robert W. Brower, Esq.
400 Webster St. Suite 200
Oakland, Ca.

John M. True, III
625 Third Street
San Francisco, Ca.

MUNICIPAL COURT FOR THE OAKLAND-PIEDMONT JUDICIAL DISTRICT, COUNTY OF ALAMEDA, STATE OF CALIFORNIA .

Bourke

Plaintiff(s)

No. 389281

Schuman, et al

Defendant(s)

Minutes
Minute Order

Department: 14 Judge: Roderic Duncan

Cause Called for Plaintiff: Patricia Bourke appearing by attorney R. W. Brower

Defendant appearing by attorney W. Gibbs

Court Reporter Renee Dayce

It is ordered that the Petition of Plaintiff to vacate Arbitration Award be and is DENIED.

Minutes of Nov. 7 1985

Entered on Nov. 7 1985

George R. Dickey, Clerk

By s/ G. Sabella
Deputy Clerk

(proof of service omitted)

Patricia M. Bourke
Attorney at Law
6572 Lucas Ave.
Oakland, Ca.

William Gibbs, Esq.
449 15th St. Ste.406
Oakland, Ca. 94612

MUNICIPAL COURT FOR THE OAKLAND-PIEDMONT JUDICIAL DISTRICT, COUNTY OF ALAMEDA, STATE OF CALIFORNIA

Bourke

. Plaintiff(s)

No. 389281

Schuman, et al

Defendant(s)

Minutes
Minute Order

Department: 14 Judge: Roderic Duncan

Cause Called for Motion for Reconsideration etc.

Plaintiff Patricia Bourke appearing

Defendant appearing by attorney W. Gibbs

Court Reporter Dana LaTrielle

It is ordered that the motion of

Plaintiff for reconsideration/renewal

of motion to vacate Arbitration Award

be and is DENIED

Minutes of Dec. 8 1985

Entered on Dec. 8 1985

George R. Dickey, Clerk
By s/ G. Sabella

(Proof of Service Omitted)

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA

Date: 8/25/86 Hon. Benjamin Travis, P.J.
Winton McKibben, J.
Mark Eaton, J.

Patricia M. Bourke

v-

Jeanne Schuman,

No. 1460
Muni. # 389281

Deputy Clerk: Charlene Goff
Appellate Dept: 28

Nature of Proceedings: Appeal on Judgment

In the above entitled action oral argument presented, the court orders the case affirmed. 3-0 Remittitur to issue.

The Court further orders the matter set for hearing 10-17-86 at 2:00 pm in the Appellate Department of this court. The hearing is to determine if sanctions should be imposed pursuant to CCP 907; Briefs should be filed by 9-30-86.

(proof of service omitted)

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA

Date: 9/25/86 Hon. Benjamin Travis, P.J.

Deputy Clerk Jeffrey K. Jue

Appellate Dept. 28

Patricia M. Bourke

v-

Jeanne Schuman No. 1460

Nature of Proceedings: Petition for Rehearing And Request for Certification to District Court of Appeal

In the above entitled case appellant's request for rehearing is denied as will as request for certification to the district court of appeals.

Rehearing denied 3 to 0

Certification denied 3 to 0

Copies of this minute order mailed this date to:

Richard Jones
Patricia M. Bourke
Attorney at Law
286 Santa Clara Ave.
Oakland, Ca.

William Gibbs
1955 Mountain Blvd.
Oakland, Ca. 94611

COURT OF APPEAL IN AND FOR
FIRST APPELLATE DISTRICT
DIVISION FIVE

(Filed 10/29/86)

PATRICIA M. BOURKE,

Petitioner, A036655

vs.

SUPERIOR COURT OF ALAMEDA COUNTY,

Respondent,

JEANNE SCHUMAN,

Real Party in Interest.

BY THE COURT

The petition for writ certiorari is denied

dated: Oct. 29, 1986

s/ Low, P.J.

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

1ST DISTRICT, DIVISION 5, NO. A036655

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK (Filed 12/17/86)

BOURKE, Petitioner,

v.

SUPERIOR COURT OF THE COUNTY OF ALAMEDA, Respondent; JEANNE SCHUMAN, Real Party In Interest.

Broussard, J., DID NOT PARTICIPATE

Petition for Review Denied.

Bird

Chief Justice

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA

Date: 4/6/87 Hon. Winton McKibben, P. J.
Hon. Alice Sullivan
Hon. Richard Bartalini

Deputy Clerk Jeffrey J. Jue

Appellate Dept. 28

Patricia M. Bourke

No. 1460

v.

Jeanne Schuman

Nature of Proceedings:

Motion for Reconsideration of Sanctions
C.C.P. 1008

In the above entitled matter Appellant's motion for reconsideration of sanctions is denied.

Copies of this minute order mailed this date to:

Patricia M. Bourke
Attorney at Law
P. O. Box 415
Walnut Creek, California
94596

William Gibbs
1955 Mountain
Oakland, Ca.94611

COURT OF APPEAL IN AND FOR
FIRST APPELLATE DISTRICT
DIVISION FIVE

(Filed 5/8/87)

PATRICIA M. BOURKE,

Petitioner,

A038393
Alameda No. 1460

vs.

SUPERIOR COURT OF ALAMEDA COUNTY,

Respondent,

JEANNE SCHUMAN,

Real Party in Interest.

BY THE COURT

The petition for writ certiorari is denied

Dated: May 8, 1987

s/ Low, P.J.

---

*(Before Low, P.J., King, J. and Haning, J.)